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THE DISCIPLINARY POWERS OF PROFESSIONAL BODIES

IN the days of the mediæval guild system the ordinary citizen was accustomed to submit himself in the matter of his profession or trade to a body of his colleagues with wide powers of enforcing discipline over all its members.¹ The disappearance of the guilds led to a move in the direction from status to contract whereby trade, industry, and employment became largely a matter of individual contractual arrangement between master and man, with the power of discipline, including the all-important right of dismissal, vested in the master by contract. Some professional activities it is true retained a semblance of the mediæval organisation whereby the particular professions in question could only be pursued by persons admitted as members, for example, in the case of surgeons and barristers.² Moreover, where such bodies existed they retained powers of enforcing discipline upon their members.³ None the less it was only in a very limited class of occupations that this controlling organisation prevailed, and outside the sphere of these close corporations a man could pursue his chosen avocation without enrolling himself as a member of any professional body with self-appointed powers⁴ over his professional life. This is not to say that such a person was necessarily better off than is his modern successor, for just as trade unions, while to some extent limiting the contractual freedom of the worker, have vastly improved his

¹ See Brentano, *Gilds and Trade Unions*, pp. 60 *et seq.*; Cunningham, *Growth of English Industry and Commerce*, I, 342.

² For barristers see *Booreman's Case* (1641) March N.R. 177, pl. 235; Holdsworth, *H.E.L.*, II, 497; III, 434. The different branches of the medical profession were not regularly distinguished in England before the sixteenth century. The Company of Barber-Surgeons was incorporated in 1461 but without disciplinary powers; in 1540 it was re-incorporated and given these powers: see *Encycl. Brit.*, 14th ed., II, 124.

³ For the obscure position of attornies before the modern organisation of the solicitors' branch of the profession see Holdsworth, *H.E.L.*, VI, pp. 432 *et seq.* From an early period they were regarded as officers of the courts, and were admitted by and attached to particular courts, which exercised control over them, but they possessed no independent professional organisation (*ibid.*, pp. 433, 442-3). Cf. *Byrchley's Case* (1585), where it was adjudged that to say of an attorney 'Thou dealest on both sides' was a slander of him in his profession, and if the words were true he should be indicted, fined and imprisoned, and 'put out of the roll of attornies and cast over the bar' (Jenkins, 262). Whether the last portion of the sentence was to be executed literally does not appear.

⁴ Such powers may be subject to statutory regulations; see *infra*.

status and bargaining position, so, too, the professional bodies have been created with the object, successfully attained in most cases, of raising the standing of the particular type of activity and protecting its exponents from disreputable and unscrupulous competitors. In return for these manifest benefits, it is not perhaps unreasonable—and indeed it is vital for the existence of a real professional *esprit de corps*—that some measure of personal freedom should be surrendered to the governing body. The wheel has thus turned full circle and at the present day an ever-increasing number of professional and semi-professional occupations are becoming subjected to bodies charged under their rules with far-reaching disciplinary powers over the members. Some of such bodies are given statutory constitutions,⁵ others rejoice in the possession of royal charters,⁶ and there remains a large and increasing number whose rules and constitutions are purely the creation of the members past and present.⁷ In addition there are other self-appointed bodies with considerable powers over all who pursue or wish to pursue a particular class of activity, and who exercise those powers not by admitting persons to membership but by granting them licences enabling them to pursue their avocation, subject to the powers

⁵ *E.g.*, the General Medical Council, which is a corporate body first established by the Medical Act, 1858. It has a statutory power, after due inquiry, to direct that a medical practitioner found guilty of infamous conduct in a professional respect be removed from the register (s. 29). There is no appeal except where there has been a failure of 'natural justice' as explained below, in which case the decision may either be quashed by order of certiorari (see *General Medical Council v. Spackman* [1943] A.C. 627) or an injunction obtained restraining the Council from acting on the invalid decision (see *Leeson v. G.M.C.*, 43 Ch.D. 366). The Medical Bill which is now before Parliament proposes to transfer disciplinary powers to a Medical Disciplinary Committee (cl. 13), and for appeals to lie to the Privy Council (cl. 19). Such appeals will apparently involve a full right of appeal on the facts and the law (see next note).

⁶ *E.g.*, the Pharmaceutical Society, incorporated by royal charter in 1843 and confirmed by the Pharmacy Act, 1852. The power of removal by the Statutory Committee is expressly conferred by statute, with a right of appeal to the High Court (see Pharmacy Act, 1933, ss. 7 and 14). So, too, the Royal College of Veterinary Surgeons was incorporated by royal charter in 1844 and confirmed by the V.S. Act, 1881. S. 8 of that Act provided for appeals against removals to the Privy Council, but by the V.S. Act, 1948, s. 18, such appeals now lie to the High Court. In both these instances an appeal will be by way of notice of motion to the Divisional Court and the court has power to hear evidence by affidavit or orally (R.S.C., O. 59, r. 38). It is a full right of appeal and 'the court must inquire into all the circumstances, and is absolutely unfettered in any investigation which it may think right to make': *per* Lord Reading C.J. in *Stock v. Central Midwives Board* [1915] 3 K.B. 766, 763. Cf. the right of appeal of an architect against the removal of his name from the Register by the Architects' Registration Council (Architects (Registration) Act, 1931, ss. 3, 7 and 9).

⁷ *E.g.*, the Stock Exchange, which is an unincorporated body under a deed of settlement executed in 1857. Of course the efficacy of expulsion from a professional body which has not received a statutory monopoly will depend upon its status in the eyes of the public. Anyone may still describe himself as an 'engineer', but one who has been expelled from some acknowledged institute of engineering will not be able to continue to call himself a member of that body, and this may substantially or entirely destroy his future professional prospects. Some bodies, such as the Stock Exchange and the Jockey Club, enjoy a virtual monopoly by custom hardly less effective than statute.

that the licensing body has assumed. Instances of this are licences granted to racing trainers by the Stewards of the Jockey Club,⁸ or licences issued to boxing managers or referees by the Boxing Board of Control.⁹ It is no part of the purpose of this article, which is concerned solely with the legal problems arising from this situation, to criticise the admirable and doubtless successful efforts of such bodies to protect the public in the interests of clean sport and on other grounds. It is none the less true that some of them have, however laudable the motives, acquired a virtual monopoly of certain kinds of activity without the consent of the present pursuers of those activities or their predecessors, and without their being able to exercise the smallest voice in the making of the rules or the constitution or in the election of the officers. This is a fact not without significance in a modern democratic state, and is hardly dispelled by the assertion that if a man does not wish to be a jockey or trainer licensed by the Jockey Club he can engage in some other profession, or ride or train in enclosures beyond their jurisdiction.¹⁰ Such arguments have the same ring of reality as those of the opponents of the early factory legislation, who insisted that a child was not compelled to work fourteen hours a day, since he was not bound to seek that class of employment.¹¹

It is often asserted that one of the inherent merits of the common law is its elastic quality of adapting itself to meet new situations and changed social conditions. Here then is a useful touchstone of that quality, whereby it may be possible to see how far the common law has been able to find, in its venerable armoury, some instrument which can be conveniently adapted to resolving the conflict of interest which may arise between the citizen and the professional or quasi-professional body which controls his means of livelihood. Two conceptions, curiously contrasted in their nature—one a doctrine *stricti juris*, that of property, and the other a far vaguer and almost political dogma, *viz.*, natural justice—were the raw materials out of which the courts have sought to forge an instrument appropriate for resolving the limits of their jurisdiction in these domestic disputes. The part played by the idea of property in this branch of law will emerge hereafter. As for ‘natural justice’ this rather high-flown expression¹² seems to mean no more than

⁸ See *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109.

⁹ See *Lumiansky v. Myddleton* (1934) 78 S.J. 223; *Wells v. Myddleton* (1935) 79 S.J. 270.

¹⁰ Cf. *per* Lord Goddard C.J. in *Russell v. Duke of Norfolk* [1948] 1 All E.R. at p. 491.

¹¹ Thus in a Commons debate in 1836 one Member asserted that children of twelve ought to be as free as their elders to make what arrangements suited them: see J. L. & B. Hammond, *Lord Shaftesbury*, Cap. IV. It is surprising to read the opinion of such a ‘radical’ as Brougham to the effect that ‘every man had a 10 hours Bill already: he could work 10 hours if he pleased, and no power on earth could make him work more, unless he liked’ (*ibid.*, Cap. VIII).

¹² ‘In so far as the term “natural justice” means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted

that a person charged with misconduct should be given a reasonable opportunity of making his defence,¹³ and that the decision should be reached in good faith and without bias.¹⁴ The courts are not concerned with the merits or reasonableness of the decision, they will not sit as a court of appeal from a domestic tribunal, but are only concerned to see that the tribunal has acted honestly. It may be that the court will interfere if there was absolutely no evidence whatever on the basis of which the tribunal could have reached its finding,¹⁵ but possibly only here on the ground that the decision was so patently unreasonable as to afford evidence of bad faith.¹⁶ If this is the correct view, then if the court were satisfied that the tribunal acted in good faith, its decision, however grossly unreasonable or unsupported by a scintilla of evidence, could not be impugned. Moreover, evidence here does not mean evidence such as would be receivable in a court of law; a domestic tribunal of this kind is not in any way bound by legal rules of evidence or procedure,¹⁷ and it can moreover inform its mind in any way it sees fit, *e.g.*, by availing itself of its own knowledge and experience,¹⁸ provided always that the accused is given a fair opportunity of dealing with the case that is made against him.

transfer into the ethical sphere of a term employed for other distinctions; and in so far as it is resorted to for other purposes, it is vacuous' (Lord Shaw in *L.G.B. v. Arlidge* [1915] A.C. at p. 138). In *Green v. Blake* [1948] Ir.R. 242, at p. 268, Black J. said: 'For me, natural justice means no more than justice without any epithet. I take the essentials of justice to mean those desiderata which, in the existing stage of our mental and moral development, we regard as essential, in contra-distinction from the many extra precautions, helpful to justice but not indispensable to it . . .'

¹³ See *Dawkins v. Antrobus*, 17 Ch.D. 615; *Lamberton v. Thorpe* (1929) 141 L.T. 638. This includes giving the accused member a proper notice of the charge which is to be made: *Fisher v. Keane*, 11 Ch.D. 353; *Gray v. Allison*, 25 T.L.R. 531.

¹⁴ *Richardson-Gardner v. Freemantle*, 24 L.T. 81, 85. *Seem*, whether the rules of natural justice have been complied with is a question of law for the judge, though if there is a dispute as to the facts the jury should be asked to resolve what the primary facts were: see *per* Tucker and Denning L.J.J. in *Russell v. Duke of Norfolk* [1949] 1 All E.R. at pp. 116-8, 119. Cf. *Green v. Blake* [1948] Ir.R. 242 at pp. 262-8.

¹⁵ See *per* Maugham J. in *Maclean v. Workers' Union* [1929] 1 Ch. 602 at p. 621. Cf. *Osgood v. Nelson* (1872) L.R. 5 H.L. at pp. 650, 654; *Thompson v. B.M.A.* [1924] A.C. 764, 778.

¹⁶ Cf. *Bowen L.J. in Leeson v. G.M.C.*, 43 Ch.D. at p. 384.

¹⁷ See *per* Lord Loreburn L.C. in *Board of Education v. Rice* [1911] A.C. at p. 182. But this oft-quoted dictum must not be regarded as a complete guide in all cases. Thus it is not correct to say that the body in question 'need not examine witnesses', for if they are tendered by the accused person it must examine them: *per* Lord Atkin in *G.M.C. v. Spackman* [1943] A.C. 627, at p. 638.

¹⁸ *Board of Education v. Rice*, *ut supra*; cf. *Mediterranean and Eastern Export Co. v. Fortress Fabrics, Ltd.* [1948] 2 All E.R. 186 (same principle applied to a commercial arbitrator). But the tribunal must not rely upon information within its own knowledge without giving the accused person an opportunity of dealing with that information: see *R. v. Paddington Rent Tribunal*, *ex p. Bell London Properties, Ltd.* [1949] 1 All E.R. 720.

Further the tribunal is not bound to state its reasons for the decision.¹⁹

These rules have been devised mainly in relation to cases of expulsion but would seem equally applicable to the imposition of other sanctions on grounds of misconduct.²⁰

Two currents of authority appear to have been drawn upon in the main for the formulation of these rules. Firstly, there were a number of Chancery decisions relating to the expulsion of partners or directors from trading partnerships or companies. The principal issue here to which the court seems to have directed its mind was whether a power of expulsion inserted in the partnership deed or agreement was an absolute one or subject to review by the courts. Thus in *Blissett v. Daniel*²¹ a power of expulsion was construed as absolute, and it was held that no cause need be assigned for the expulsion. The court did, however, acknowledge that the decision must be arrived at in good faith²² and it is this notion of good faith which lies at the root of the expositions of 'natural justice' in the later cases.²³ In *Inderwick v. Snell*²⁴ the articles provided for the removal of a director of a trading company for negligence, misconduct in office, or any other reasonable cause. The court held that reasonable cause did not mean what a court of law would think reasonable but what was thought reasonable by the duly assembled body of shareholders. In other words, the test of reasonableness was subjective and the act of removal was in the nature of an administrative rather than a quasi-judicial decision.²⁵

The second line of authority related to cases where Parliament had expressly conferred upon a non-judicial body the function of inquiring into and determining some quasi-judicial issue. Here again the question inevitably turned upon the construction of the relevant statutory provision and whether in particular Parliament had intended to confer an absolute power upon the body in question, not subject to review by the courts. This class of case was considered (as it would still normally be) on an application for a prerogative writ, and if the court was of opinion that Parliament had conferred a complete discretion no issue could be raised

¹⁹ *Hayman v. Governors of Rugby School* (1874) L.R. 18 Eq. 28, at pp. 68-9, per Malins V.-C. The statement that if reasons are given the court will look at their sufficiency (p. 69), seems to mean no more than that the court will consider whether they reveal any evidence of bad faith. Cf. *Cassel v. Inglis* [1916] 2 Ch. 211.

²⁰ E.g., the requiring of a money payment: cf. *Hardie & Lane, Ltd. v. Chilton* [1928] 2 K.B. 306; or the deprivation of a salaried office: see *Crisp v. South African, etc., Union* [1930] A.D. 225 (South African case).

²¹ (1853) 10 Hare 493.

²³ Cf. *Dawkins v. Antrobus*, 17 Ch.D. at p. 630.

²⁴ (1850) 2 Mac. & G. 216.

²² See pp. 504, 522.

²⁵ It is interesting to compare this decision with the reasoning of the House of Lords in *Liversidge v. Anderson* [1942] A.C. 206. The strictures of Lord Atkin in that case on the 'hitherto unheard of "subjective" construction' (p. 239) seem equally applicable here.

within the competence of the court, save as to whether the tribunal had acted within its statutory jurisdiction. Thus in *Ex p. La Mert* where a medical practitioner had been struck off the register for professional misconduct after inquiry by the Medical Council under their statutory powers,²⁶ it was held that the council were the sole judges under that Act and that the court could not interfere.²⁷ Here, too, the decision was required to be arrived at in good faith.²⁸

In both these types of case then there are clear signs of the inclination of the court to regard such matters as essentially domestic in character and to concede to the body or tribunal in question an absolute power, subject only to the requirement of good faith. This tendency was greatly reinforced in the club cases, the courts taking the view that the relation between the members and the club was essentially a personal one which should only give rise to judicial intervention in the most flagrant cases.²⁹

It will be seen that in the case of partnerships and also of bodies with statutory powers no real question of jurisdiction could arise, for in the former instance the Court of Chancery was plainly seised of any dispute arising out of the articles of agreement, and in the latter the existence of the prerogative writs entitled the Court of King's Bench to scrutinise any alleged excess of statutory jurisdiction. In the club cases, however, where these bodies were for the most part mere voluntary associations, there was no such obvious source of jurisdiction.³⁰ In seeking for a basis upon which intervention might be warranted the courts, seemingly influenced by the judicial reluctance to intervene in 'domestic' disputes, therefore placed its intervention upon the narrowest of grounds *viz.*, infringement of the right of property. 'I have no doubt whatever' (observed Jessel M.R. in a leading case³¹) 'that the foundation of the jurisdiction is the right of property vested in the member of the society, and of which he is unjustly deprived by such unlawful expulsion.' But save for one later attempt³² to limit the scope of

²⁶ Medical Act, 1858, s. 29.

²⁷ (1863) 4 B. & S. 578, followed in *Allbutt v. G.M.C.* (1889) 23 Q.B.D.400. Cf. *R. v. G.M.C.* (1861) 30 L.J.Q.B. 201.

²⁸ Cf. *Osgood v. Nelson* (1872) L.R. 5 H.L. 636 (removal of a chief clerk of a county court by the mayor and council under their statutory powers of removal for 'reasonable cause'. The judges, in advising the House of Lords, expressed the view that they were not to act as a Court of Appeal but would not permit removal for a mere caprice or a futile cause. The cause had to be a reasonable and substantial one (p. 647). On the need for good faith and a fair hearing see at pp. 646, 652).

²⁹ 'None but the members of the club can know the little details which are essential to the social well-being of such a society of gentlemen, and it must be a very strong case that would induce this court to interfere' (*per* Lord Romilly M.R. in *Hopkinson v. Marquis of Exeter*, L.R. 5 Eq. at p. 68).

³⁰ Cf. *Clough v. Ratcliffe* (1847) 1 De G. & Sm. 164.

³¹ *Rigby v. Connol*, 14 Ch.D. 482 at p. 487.

³² *Per* Fletcher Moulton L.J. in *Osborne v. A.S.R.S.* [1911] 1 Ch. at p. 562, who pointed out that 'property' here could not be limited to a beneficial interest in land or chattels. Cf. *infra*.

this broad proposition neither the basis nor the full implications of this doctrine have ever been judicially explored. The tendency has rather been to go on repeating this formula uncritically so that at the present time there is a certain danger of its being conceded by default.³³ *Communis error facit ius*.

Be this as it may, the foregoing rules of natural justice have been generalised by the courts over the last century to fit the complex relationships of modern society and they have thus been applied to the whole range of so-called quasi-judicial functions, so that not merely the professional man, the patent agent,³⁴ or the medical practitioner,³⁵ who is expelled by his professional body, or the trainer of race-horses whose licence is withdrawn, finds this meagre texture of rules alone protects his whole professional status, but the same doctrines have been extended to every class of case where a non-judicial body exercises quasi-judicial functions, e.g., in the case of a Minister who confirms a clearance order under the Housing Acts,³⁶ or a Rent Tribunal which has reduced a rent to an amount which it considers reasonable.³⁷ The broad context of the judicial review of decisions of administrative tribunals is happily outside the scope of this article, which is confined to the question of jurisdiction over professional or semi-professional bodies. In this connection, however, two salient points emerge. Firstly, there seems little reason why the courts should have been so ready to assume that such questions are purely a matter of domestic jurisdiction better left to be finally and conclusively resolved by a private tribunal. Indeed, it is not without significance that within the legal profession itself far greater supervisory powers have been reserved than in the case of other domestic tribunals.³⁸ This leads to the second point, which concerns the

³³ See, e.g., *Baird v. Wells*, 44 Ch.D. 661, 675; *Millican v. Sullivan* (1888) 4 T.L.R. 203, 204; *Weinberger v. Inglis* [1918] 1 Ch. 517, 543, 547, 555; *Watt v. McLaughlin* [1923] 1 Ir.R. 112, 118; *Cookson v. Harewood* [1932] 2 K.B. 478, 481, 489; *Donaldson v. Institute of Botano-Therapy* (1937) 184 L.T.Jo. 384, 385.

³⁴ See *Law v. Chartered Institute of Patent Agents* [1919] 2 Ch. 276; Register of Patent Agents Rules (1950) SI No. 804, r. 17. An appeal lies to the Comptroller from an order of the Institute or Registrar (r. 18).

³⁵ See *Leeson v. G.M.C.*, 43 Ch.D. 366; *Allinson v. G.M.C.* [1894] 1 Q.B. 750. But cf. *supra*, note (5).

³⁶ *Errington v. M. of H.* [1935] 1 K.B. 249.

³⁷ *R. v. Paddington Rent Tribunal* [1947] 1 All E.R. 448. Expulsion from trade unions are also governed by these rules: *Parr v. Lancs. and Cheshire Miners' Fedn.* [1913] 1 Ch. 366; *Maclean v. Workers' Union* [1929] 1 Ch. 602. So also, presumably, would the case of a member of a trade association who is put on a 'stop-list'.

³⁸ See Solicitors Act, 1932, s. 8. The Law Society was incorporated by royal charter in 1845. Where a solicitor has been struck off the roll for professional misconduct an appeal lies to the Divisional Court of the King's Bench Division. Such an appeal is by way of a re-hearing (see now Solicitors (Disciplinary Appeals) Rules, 1942, rr. 1 and 9; *Re A Solicitor* (No. 2) (1924) 93 L.J.K.B. 761, 763), and a further appeal lies to the Court of Appeal without leave: *Re Hardwick* (1883) 12 Q.B.D. 148; *Re A Solicitor* [1945] 1 All E.R. 445. Barristers possess a right of appeal to the Lord Chancellor and the judges of the

basis upon which the jurisdiction of the courts is to be placed. One thing seems perfectly plain and that is the inadequacy of property rights as the foundation for this type of jurisdiction. This is especially so since the courts have to hand a far more convenient and flexible instrument upon which to base their jurisdiction: the category of contract with its elastic conception of implied terms. It must be rare indeed that the acquisition of professional or semi-professional status is not associated with some transaction out of which it is possible to infer both an intention to enter into legal relations, and also the giving of some valuable consideration, whether by the purchase of a licence, the payment of a subscription, or even the mere agreement to submit to the society's jurisdiction. Such a society cannot usually exist without financial contributions and there seems no reason why such contributions should not produce contractual obligations, nor why the courts should not be ready to infer a contractual nexus³⁹ where possible, even in the absence of a pecuniary consideration. The advantages of such an approach are manifest, for not only does it obviate the artificial distinctions which result from seeking out some interest of a proprietary kind, but it also immensely widens and rationalises the scope of the remedy, and makes it quite immaterial to consider such questions as whether the aggrieved person was or was not an actual member of the society.⁴⁰ For on this footing the court need only pause to inquire whether there was a contract between the parties, and if so what were its terms both express or implied, and whether there has been a breach of those terms. The opinion may be ventured that the courts are beginning to approach this viewpoint but with noticeable hesitation derived largely from the *damnosa hereditas* of the old club cases. It is proposed to examine here, *firstly*, the extent to which the modern cases support the broadening of the jurisdiction on a contractual basis, *secondly*, how far, if at all, the law of tort might be prayed in aid to enlarge this jurisdiction, *thirdly*, whether any effective substitute for natural justice might be elicited by the courts, *fourthly*, how far natural justice can be excluded by consent, *fifthly*, what remedies are available to an aggrieved professional man, whose professional body has improperly deprived him of the source of his livelihood.

(1) In *Rigby v. Connol*, Jessel M.R. gave as instances of associations which having no common property would not justify

High Court, sitting as a domestic tribunal (see Halsbury, *Laws of England*, Hailsham ed., Vol. II, p. 477-8). Under the new Legal Aid and Advice Act, 1949, any solicitor or barrister who is removed from the panels of those willing to act for assisted litigants has a right of appeal to the High Court (s. 6 (3)).

³⁹ It was argued in *Russell v. Duke of Norfolk*, for the defendants, that the payment of the fee of a shilling for the trainer's licence did not constitute a contract for valuable consideration but was merely a grant of a licence upon a condition (see [1948] 1 All E.R. at p. 490). No judicial opinion was expressed upon this point.

⁴⁰ Cf. *per* Slessor L.J. in *Cookson v. Harewood*, cited *infra*.

the intervention of the courts, those of a dozen people agreeing to meet and play whist at each other's houses for a certain period, or a hundred scientific men agreeing to hold common meetings.⁴¹ Such cases would seem more readily explicable on the footing that they are devoid of a contractual basis, being cases where the parties obviously do not intend to enter into legal relations.⁴² A further development which entails emphasis of the contractual aspect is the judicial view, at least tacitly followed in subsequent decisions,⁴³ that the conception of property extends to include a case where a subscription is payable but there is no common property held for the beneficial interest of the members.⁴⁴ Moreover the need to comply with the rules in the conduct of the quasi-judicial inquiry seems to be based on their contractual nature⁴⁵ and if they amount to a contract it is difficult to see why they are not enforceable in their own right. Indeed the whole conception of property in the strict sense is bound to lead to utterly unreal distinctions between corporate and incorporate bodies, proprietary and member's clubs,⁴⁶ and bodies which maintain a meeting-place for the members and others which are devoid of property; distinctions irrelevant to the real issue, which is whether there is an unfettered power to deprive a man of his professional livelihood. Yet it must be admitted that the proprietary basis of the jurisdiction has been by no means exorcized by the modern cases. Thus in *Cookson v. Harewood*⁴⁷ where the question arose out of the right of the Pony Club to withdraw a trainer's licence without first giving him a hearing in accordance with natural justice, Slessor L.J. referred to the fact that the basis of the court's power to interfere in such matters reposed upon an infringement of property, and doubted

⁴¹ 14 Ch.D. at p. 487.

⁴² See *Balfour v. Balfour* [1919] 2 K.B. 571; *Rose and Frank Co. v. Crompton, Ltd.* [1925] A.C. 445; *Appleson v. Littlewood, Ltd.* [1939] 1 All E.R. 464. Cf. *Forbes v. Eden*, 1 H.L.Sc.App. 568, followed in *Watt v. MacLaughlin* [1923] 1 Ir. R. 112, but which may perhaps be based on the ground that no injunction will issue where no damage has been suffered and there is no likelihood of any damage arising in the future.

⁴³ See, e.g., *Young v. Ladies Imperial Club, Ltd.* [1920] 2 K.B. 523; *Donaldson v. Institute of Botano-Therapy, Ltd.* (1937) 184 L.T.Jo. 384.

⁴⁴ *Osborne v. A.S.R.S.* [1911] 1 Ch. at p. 562 (per Fletcher Moulton L.J. instancing the case of an association of members subscribing for a charitable purpose the whole fund to be used for that purpose). As in such a case the property would normally be vested in trustees this is to reduce the concept of property, so far as the members are concerned, to its lowest ebb.

⁴⁵ Cf. per Lord Denman in *Innes v. Wylie*, 1 C. & K. at p. 264.

⁴⁶ Thus it seems quite clear that the rules of natural justice will apply even to an incorporated proprietary club, at any rate where the member pays a subscription: see *Young v. Ladies' Imperial Club, Ltd.* [1920] 2 K.B. 523. The only difference between cases where the society is or is not an incorporated body lies in the procedural approach. If incorporated the body itself can be made defendant; otherwise the member must bring his proceedings either against the members of the committee or other executive organ personally, or bring a representative action under R.S.C., O. 16, r. 9: cf. the author's article in (1949) 12 M.L.R. 409 *et seq.*

⁴⁷ [1932] 2 K.B. 478.

whether there could be any such basis for interference where the dismissed trainer was not a member of nor had any proprietary interest in the Pony Club itself.⁴⁸ This would have the effect of depriving the court of all right to intervene, however flagrantly unjust the conduct of the inquiry, merely because the unfortunate trainer would be unable to point to a table and chair belonging to the club which he had a right to share.

The view that jurisdiction may be rested more suitably upon contract also derives some support from the early case of *Millican v. Sullivan*.⁴⁹ In that case the plaintiff had paid an annual subscription of one guinea to a voluntary hospital whereby he became a governor. He was appointed an honorary surgeon of the hospital which entitled him to the use of certain rooms and furniture in the hospital. Later he was improperly suspended from his appointment as honorary surgeon on the ground that he had joined another hospital where homœopathy was practised. The Court of Appeal held that no injunction would issue since there was no interference with property rights and even if the relation was a contractual one it was also a purely personal relationship, and Equity would not grant an injunction to enforce such a contract. Damages might be awarded but in the present case they were only nominal.⁵⁰

It may be thought that this decision does afford a useful clue to the rather peculiar development of this branch of the law. As Sir Raymond Evershed pointed out recently,⁵¹ English law, and especially Equity, attaches very great importance to procedure, and many apparent rules of substantive law are found ultimately to repose upon the basis of some point of procedure. Equitable remedies have in this way played a very great part in determining the ambit of rights, so that frequently the real efficacy of a right can only be properly considered from the point of view of whether a court of Equity would decree specific performance or an injunction.⁵² Now as from a legal point of view the damages claimable by a person wrongfully expelled from his club may be purely nominal⁵³ or at any rate not the real gist of his complaint, it is not surprising that such a person normally has recourse to the more effective remedies of Equity, *viz.*, in this case to an injunction and a declaration of right. But in the case of both of these remedies the litigant has found himself confronted by hurdles which were not easily scaled.

⁴⁸ At p. 489. Cf. *per* Scrutton L.J. at p. 481.

⁴⁹ 4 T.L.R. 203.

⁵⁰ It is to be noted that on the facts there was no interference with the plaintiff's position either as a subscriber to or governor of the hospital.

⁵¹ In an address to the S.P.T.L.: see *Journal of S.P.T.L.* (1948), p. 173.

⁵² Cf. *Hurst v. Picture Theatres, Ltd.* [1915] 1 K.B. 1; now apparently disentangled from the rules of equity procedure by the H.L. in *Winter Garden Theatre v. Millennium Productions* [1948] A.C. 173.

⁵³ But see *infra*.

So far as an injunction was concerned Equity would not normally grant an order of this kind where the damages were merely nominal, though there were (and are) exceptions to this principle.⁵⁴ Furthermore, although an injunction could be obtained to restrain a breach of contract this would generally not apply to a contract of a personal kind, as, for example, in the case of a master and servant relationship.⁵⁵ And as has been seen, the judicial tendency was to treat the relation of a member to his club as essentially personal, so that it is not hard to appreciate why nothing less than an interference with property would induce the court to intervene. Jurisdiction here meant in effect no more than the circumstances in which Equity would use its discretionary power to grant its special remedies. And no litigant could claim such remedies *ex debito justitiæ*.

The position in relation to an action for a declaration of right was certainly no more helpful to the aggrieved member expelled from his club. Before 1852 the Court of Chancery had no jurisdiction to make a simple declaration of right without granting consequential relief,⁵⁶ and on this ground a declaration was refused where certain members of an unincorporated friendly society filed a bill praying that their exclusion from the lodge was illegal and void.⁵⁷ The Chancery Procedure Act of 1852⁵⁸ allowed a declaration to be made even if no consequential relief was granted, but this was judicially construed as limited to cases where the claimant would have been entitled, if he chose to ask for it, to some immediate equitable relief.⁵⁹ The present position is governed by the Rules of the Supreme Court,⁶⁰ which have extended the practice to an ill-defined extent,⁶¹ though it is settled that the court⁶² has jurisdiction to make a declaration even where the claimant is not entitled to any immediate relief.⁶³ This power is however exercised very sparingly, so that declarations as to future rights will not be made except in special circumstances, or unless a present right depends upon the decision.⁶⁴ The court will not give an opinion

⁵⁴ See *Rochdale Canal Co. v. King* (1851) 2 Sim.(N.S.) 78; cf. *Young v. Ladies' Imperial Club, Ltd.* [1920] 2 K.B. 523.

⁵⁵ At any rate in the absence of an express negative stipulation: *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416.

⁵⁶ *Grove v. Bastard* (1848) 2 Ph. 619, per Lord Cottenham L.C. at pp. 621-2.

⁵⁷ *Clough v. Ratcliffe* (1847) 1 De G. & Sm. 164. ⁶

⁵⁸ S. 50.

⁵⁹ *Jackson v. Turnley* (1853) 1 Drew. at pp. 626-7; *Rooke v. Kensington* (1856) 2 K. & J. 753, 761-2.

⁶⁰ See R.S.C., O. 25, r. 5.

⁶¹ See *Guaranty Trust Co. v. Hannay* [1915] 2 K.B. 536; *Hammerton v. Dysant* [1916] 1 A.C. 57; *Thomas v. Moore* [1918] 1 K.B. 555. In *Hanson v. Radcliffe U.D.C.* [1922] 2 Ch. at p. 507, Lord Sterndale M.R. said the power of the court to make a declaration was only limited by its own discretion.

⁶² Which may now of course be any Division of the High Court, or even the county court, provided it is ancillary to a claim for damages within the jurisdiction: see *De Vries v. Smallridge* [1928] 1 K.B. 482.

⁶³ *Powell v. Jones* [1905] 1 K.B. 11; *Cope v. Crossingham* [1909] 2 Ch. 148.

⁶⁴ See *Re Staples* [1916] 1 Ch. 322; *Re Clay* [1919] 1 Ch. 66.

upon a merely speculative or academic question, but it will grant a declaration that a contract is or is not binding on a party even though no claim to damages has yet occurred, provided the party's present conduct and ultimate liability may be affected by the decision. Thus where a commercial contract would have continued for a year and a half and a breach of it would have resulted in claims for heavy damages, a party thereto was held entitled to a declaration that it was not binding upon him.⁶⁵ Where, therefore, a member has been wrongfully expelled in breach of his contract of membership but he can show only nominal damage, it would seem that the court has jurisdiction to make a declaration that the expulsion was unlawful,⁶⁶ though the member would not be entitled to claim such a declaration in advance of the meeting at which he believes he is to be expelled, for such an action would be altogether premature.⁶⁷ But a declaration alone might well prove an empty remedy, and it remains to examine whether an injunction might not also be available at the present day where the membership is of a contractual kind. In effect there is some evidence of a strong tendency on the part of the courts to regard membership of a professional body as more than a mere personal relationship but rather as something capable of giving rise to a contractual nexus a breach of which, for example by wrongful expulsion, entitles the aggrieved member to both a declaration and an injunction.

The leading authority on this matter is unquestionably that of *Weinberger v. Inglis*,⁶⁸ though it is far from easy to deduce any clear principle from the profusion of dicta in which that case abounds. The plaintiff in the action was a naturalised British subject of German birth and had been a member of the Stock Exchange for many years. Membership of that body is granted annually, and an annual subscription is payable. During the 1914-18 War the plaintiff applied for re-election as a member but his application was refused. The deed of settlement constituting the Stock Exchange provided that the Committee should admit such persons as they 'think proper'. All the learned law lords took the view that in the circumstances there had been no improper exercise of the discretion vested in the Committee, but various opinions were expressed obiter as to whether there was in fact any duty upon the Committee towards the plaintiff to exercise their discretion fairly and honestly. Lord Birkenhead L.C. merely observed on this that if the plaintiff had been condemned upon grounds never brought to his notice he would not assent to the

⁶⁵ *Société Maritime et Commerciale v. Venus* (1904) 9 Com.Cas. 289. Cf. *Hordern-Richmond v. Duncan* [1947] K.B. 545.

⁶⁶ *Donaldson v. Institute of Botano-Therapy, Ltd.* (1937) 184 L.T.Jo. 384.

⁶⁷ *Draper v. British Optical Association* [1938] 1 All E.R. 115.

⁶⁸ [1919] A.C. 606. For the relief claimed, which included both a declaration and an injunction, see [1918] 1 Ch. at pp. 529-530.

legality of this course unless compelled by authority.⁶⁹ Lord Buckmaster apparently took the view that the discretion would have to be exercised honestly,⁷⁰ and Lord Atkinson, who considered the question rather more fully, took the argument for the plaintiff to be that the discretion was in the nature of a 'fiduciary power,' comparable to that of a director of a company refusing to consent to a transfer of shares in the company, and that the case could not be put higher than that even if it could be put so high.⁷¹ The duty arising out of such a power would be, that the exercise of it could only be set aside if it were arbitrary and capricious, and if there was a refusal to exercise the power this did not entail any obligation to state the reasons for so refusing.⁷² However, in a later passage Lord Atkinson does also apparently recognise that natural justice would require that if some charge was made against the member he was entitled to notice of it, and to be afforded an opportunity of defending himself.⁷³ Lord Parmoor was not prepared to hold that the Stock Exchange had an absolutely autocratic power to act as they pleased, and thought that the inquiry into re-election was of a quasi-judicial character affecting as it did 'not only the immediate pecuniary interests, but also the whole business status of the member whose re-election was refused'.⁷⁴ The learned law lord therefore thought that the principles of natural justice as expounded in *Board of Education v. Rice*⁷⁵ might well apply to the exercise of its discretion by the Committee.⁷⁶ Lord Wrenbury, on the other hand, thought that it was a misuse of language to describe the power of the Committee as quasi-judicial and regarded it rather as an administrative power given by a principal to an agent.⁷⁷ Nevertheless he too went on to qualify this by defining the discretion as a fiduciary power which might be questioned on the ground that it had been exercised upon improper motives. This might be put on the footing that the former member enjoys a 'well-founded anticipation' that he will be re-elected: not a legal right of continuance but a tenure based on sound business considerations which he must be taken to have considered satisfactory when he paid his entrance fee. On the other hand it might be that no duty whatever was owed to a member as such but only to the body of proprietors, in which case a member—being also a proprietor in this instance—could still sue, but only in a representative action brought on behalf of himself and all the

⁶⁹ P. 616.

⁷⁰ P. 621.

⁷¹ Pp. 625-6 (citing such cases as *Re Coalport China Co.* [1895] 2 Ch. 404; *Re Bede S.S. Co.* [1917] 1 Ch. 123). Cf. the cases on expulsion from partnerships, cited *supra*.

⁷² P. 626.

⁷³ Pp. 631-2.

⁷⁴ P. 636.

⁷⁵ [1911] A.C. 179.

⁷⁶ [1919] A.C. at p. 636.

⁷⁷ *Ibid.*, p. 640.

other proprietors, with the trustees and managers as necessary parties to the action.⁷⁸

It is noteworthy that none of the law lords who examined the possible duty which might govern the Committee in the exercise of its power of re-election stopped to consider the exact legal nexus, if any, which might give rise to any such duty. None of them seemed prepared to say that there was any specific proprietary interest infringed or any contractual right to re-election.⁷⁹ On the other hand, Astbury J., who tried the case at first instance, assumed without deciding the point that the plaintiff might have had a sufficient proprietary interest to give the court jurisdiction⁸⁰ and Bankes L.J., in the Court of Appeal, also apparently took the view that the jurisdiction of the court must be based on a contractual right giving rise to a proprietary interest.⁸¹ Swinfen Eady, L.J. expressed no opinion on this matter, while Eve J. contented himself with pointing out that a retiring member had no proprietary rights.⁸²

There are four later decisions which also need to be referred to. In *Young v. Ladies' Imperial Club, Ltd.*,⁸³ the plaintiff was a member of a proprietary club, and the committee had purported to expel her by a resolution passed at a meeting which had not been properly convened, both because one member of the committee was not summoned to the meeting, and also because the notice did not state the object of the meeting with sufficient particularity. The plaintiff claimed a declaration, an injunction and damages, and the Court of Appeal granted her a declaration and damages on the ground that the rules of natural justice had not been complied with. Since the proprietary nature of the club precluded the member having any proprietary interest in the club property it would seem, though this is nowhere expressly adverted to, that jurisdiction was founded on the payment of a subscription by the member.⁸⁴

⁷⁸ Pp. 644-5. Cf. *supra*, note 46.

⁷⁹ Except Lord Birkenhead L.C., who reserved his opinion on whether the plaintiff might not have contracted to purchase the expectation that he would in due course be re-elected unless the committee concluded in good faith and after proper consideration that he was ineligible (see at p. 616).

⁸⁰ [1918] 1 Ch. 517, at p. 543.

⁸¹ P. 547.

⁸² Pp. 546, 555.

⁸³ [1920] 2 K.B. 523. Cf. *Henderson v. Kane* [1924] N.Z.L.R. 1073 (held by Salmond J. that in the case of an incorporated proprietary club, a member's rights are based on contract and that all the remedies of declaration, injunction and damages are available).

⁸⁴ In *Baird v. Wells* (1890) 40 Ch.D. 661, it was held by Stirling J. that no injunction would be granted in the case of expulsion from a proprietary club as the member had no right of property in the club. In *Young's Case* the claim for an injunction was abandoned in the court below on the authority of *Baird v. Wells* (see [1920] 1 K.B. at p. 85) and it is not clear from the report in the C. A. whether this point was reconsidered or not (cf. *Watt v. MacLaughlin* [1923] 1 Ir.R. at p. 118).

In *Maclean v. Workers' Union*,⁸⁵ where a member alleged that he had been wrongfully expelled from his trade union, Maugham J. expressly based the rights of the plaintiff on the terms of his contract, express or implied with the union.⁸⁶ In *Donaldson v. Institute of Botano-Therapy, Ltd.*,⁸⁷ the defendants were a company limited by guarantee whose object was to found and control an association of dispensers of botanic medicines. The members paid an annual subscription, but the funds were to be used purely for the purposes of the association, and no part of these was to be paid over to any of the members. On dissolution the funds were to be paid over to some similar institution. The council of the institute had power to delete the name of any member on the ground of professional misconduct. The plaintiff, who was a member, was tried on such a charge without being given an opportunity of being heard, and was found guilty and expelled. He claimed a declaration that his name had been wrongfully deleted, an order to restore his name to the roll of members, and an injunction to restrain the defendant from excluding him from membership. Farwell J. held that the expulsion was wrongful and that the plaintiff was entitled to the relief claimed, and based the jurisdiction of the court on the fact that there were benefits which might accrue from the expenditure of the subscription, which though not money payments, were none the less real benefits.⁸⁸

All these cases were concerned with wrongful exclusion of members from a society, and *Weinberger v. Inglis* itself, though not a case of expulsion but of refusal to renew a membership, nevertheless dealt with the right to membership. As already pointed out there may be other cases where the aggrieved person was never in any sense a member of the governing society but is merely given what is in effect a licence to practise his profession under its rules. It is this class of case which Slessor L.J. thought might well be outside the ambit of the club cases on the rather narrow ground that they are concerned only with the wrongful expulsion of members in the strict sense.⁸⁹ The broader view has, however, received some encouragement in the recent case of *Russell v. Duke of Norfolk*.⁹⁰ The facts of that case were very similar to the well-known case of *Chapman v. Ellesmere*,⁹¹ with the important

⁸⁵ [1929] 1 Ch. 602. Both a declaration and an injunction were claimed by way of relief.

⁸⁶ See p. 623. Cf. *Parr v. Lancs & Cheshire Miners' Fedn.* [1913] 1 Ch. 366.

⁸⁷ (1937) 184 L.T.Jo. 384.

⁸⁸ Cf. *per Bowen L.J.* in *Chamberlain v. Boyd*, 11 Q.B.D. 407, 415.

⁸⁹ Cited *supra*.

⁹⁰ [1949] 1 All E.R. 109. See also *Lumiansky v. Myddleton* (1934) 78 S.J. 223; and *Wells v. Myddleton* (1935) 79 S.J. 270, both of which however were decided on the ground that there was no failure to comply with natural justice. The basis of the jurisdiction does not appear to have been discussed. The defendants were in each case the Boxing Board of Control.

⁹¹ [1932] 2 K.B. 431.

distinction that in the later case ⁹² the plaintiff asserted that his licence had been withdrawn by the Jockey Club in disregard of the rules of natural justice.⁹³ The plaintiff, who was not a member of the Jockey Club, and obviously had no proprietary interest which had been infringed, sought to import those rules on the basis that the grant of his trainer's licence, on payment of an annual fee of a shilling, was a contract, subject to the implied term that he would not be found guilty of misconduct nor would his licence be withdrawn on that ground, without compliance with the rules of natural justice. As against this, the defendants relied on the facts that the licence was granted subject to the conditions printed upon it, and also to the Rules of Racing, the combined effect of which was that the stewards of the Jockey Club were empowered to withdraw any licence granted by them in their absolute discretion. The action failed on the ground that in any event there had been no departure from the rules of natural justice,⁹⁴ but on the question whether there was a duty upon the stewards to conduct an inquiry into the plaintiff's alleged misconduct in accordance with natural justice there was some conflict of judicial opinion. Tucker L.J. took the view that to imply any such term as contended for by the plaintiff would be to contradict the unfettered and absolute discretion to withdraw the licence vested in the stewards under the rules.⁹⁵ Asquith L.J., on the other hand, was inclined to the view, reading the rules as a whole, that where what was involved was the proposed withdrawal of a licence for misconduct, an inquiry, and one which conformed with the principles of natural justice, was a pre-condition.⁹⁶ This appears to base the obligation upon the terms, express or implied, of the contract between the parties. Denning L.J. put the matter on a much broader foundation. In his opinion there was an important distinction between merely withdrawing a licence as a matter of discretion and without inflicting any penalty, and withdrawing

⁹² In *Chapman v. Ellesmere* the plaintiff conceded that the inquiry into his alleged misconduct had been conducted perfectly fairly.

⁹³ The grounds relied upon were that the plaintiff, when summoned to attend an inquiry before the stewards of the Jockey Club, was not given adequate notice as to the nature of the charge to be made against him; that he was not prior to the hearing supplied with a copy of the analyst's report upon which the stewards relied as evidence that his horse had been doped; that at the inquiry itself only part of the report was read out to him and a material portion omitted; that he was not given any reasonable opportunity of refuting the report or the construction that the stewards put upon it, and that the report in fact disclosed no evidence whatever that the horse had been doped.

⁹⁴ The plaintiff also relied on libel in respect of a publication of the decision of the stewards in the Racing Calendar. As the court held that the rules of natural justice had not been departed from, this claim failed on the ground of privilege, there being no malice alleged. Cf. *Green v. Blake* [1948] Ir.R. 242, *infra*.

⁹⁵ [1949] 1 All E.R. p. 115. Cf. *per* Lord Goddard C.J. in the court below ([1948] 1 All E.R. pp. 490-1).

⁹⁶ [1949] 1 All E.R. p. 118. The learned Lord Justice's opening words indicating that he is taking the same view as Tucker L.J. are hardly borne out by what follows, and it seems that the headnote is inaccurate in this respect.

it as a penalty for misconduct. In the former case, provided the withdrawal was done honestly and in good faith the power was absolute and could not be impugned. Very different, however, was the case where a trainer was being arraigned for misconduct, exposing him to the penalty of disqualification. 'The Jockey Club has a monopoly in an important field of human activity. It has great powers with corresponding liabilities.'⁹⁷ Consequently, common justice required that before any man was found guilty of an offence entailing such a penalty or disqualification a proper inquiry must be held and the accused given an opportunity of being heard in accordance with natural justice. It will be seen that Denning L.J. did not base this jurisdiction on the narrow foundation of property or even of contract, but rather on the broad basis recognised by some of the law words in *Weinberger v. Inglis*.

Reference should also be made to an interesting if inconclusive decision of the Supreme Court of Eire. In *Green v. Blake*⁹⁸ the plaintiff, the owner and rider of a horse which ran in a race at a steeplechase meeting, was warned off the turf by the Stewards of the Irish National Hunt Steeplechase Committee on the ground of misconduct, after an inquiry had been held by them to investigate the charge. The finding was then published in the *Racing Calendar*, whereupon the plaintiff sued the stewards for libel. Privilege was pleaded by way of defence and reliance was placed upon *Chapman v. Ellesmere*⁹⁹ and *Cookson v. Harewood*.¹ The plaintiff, however, expressly alleged that the inquiry had been held contrary to the rules of natural justice and sought to distinguish those earlier decisions on the ground that privilege was based upon a genuine consent to the agreed mode of publication, and that such a consent was inevitably subject to the implied condition that publication was only to be permitted of the finding of an inquiry which had been fairly held.² It will be seen that, as in *Chapman v. Ellesmere*, there was no claim for breach of contract, the only cause of action relied upon being libel, but the case is not without relevance to the present discussion by reason of the views judicially expressed, in connection with the defence of privilege, as to whether an assent to publication of a finding of misconduct by a non-judicial body was subject to an implied term that the inquiry must have been fair, *i.e.*, held in accordance with the rules of natural justice. Four out of five of the learned judges³ held that such an implication did arise and that the absence of a fair hearing nullified the consent to publication and so

⁹⁷ P. 119.

⁹⁸ [1948] Ir.R. 242.

⁹⁹ *Supra*.

¹ *Supra*.

² Cf. *Hope v. I'Anson*, 18 T.L.R. 201, at p. 205 (*per* Collins M.R.).

³ The actual decision (Maguire C.J., dissenting) was that for various reasons the trial was unsatisfactory and that there should be a new trial of the whole action.

destroyed the privilege.⁴ Murnaghan J. (with whose judgment Geoghegan J. concurred) held such an implication to be both reasonable and even necessary,⁵ and thought that it would apply both to the case of a wrongful expulsion and to an action for libel.⁶ Byrne J. also thought that when the plaintiff submitted to the jurisdiction of the stewards he must be deemed to have done so on the basis that they would proceed in accordance with the rules and with the principles of natural justice.⁷ Black J. expressed a somewhat more qualified view. In his opinion the need to hold a fair inquiry postulated that *an* inquiry had to be held prior to the publication, for if the stewards were not obliged to investigate at all, they could not be bound to conduct an investigation with due regard to the essentials of justice.⁸ It was therefore necessary to have recourse to the rules under which the stewards purported to act, and, construing these in the particular case, Black J. held that whereas the publication of the warning off did not entitle the plaintiff to a preliminary hearing, such a hearing was obligatory in the case of a finding of a specific act of misconduct. Hence, in the former case, whether a fair hearing was held was irrelevant, but was highly material to the existence of privilege in the latter instance.⁹ The suggestion that the publication of information by the Turf Club to the racing community might be privileged even if it included findings of misconduct, without any consent having been given to such publication by the accused person, was rejected in trenchant terms which reveal a more positively anti-monopolist attitude that the English courts are perhaps accustomed to display.¹⁰ This submission (the learned judge observed) 'seems to involve that a small oligarchy that has appointed itself to lay down rules for horse racing with the laudable object of keeping that sport clean enjoys a preferential position in the law of libel denied to other people. . . . I believe and hope that the law recognises no such discrimination. Racing may be a royal sport but its clubs have no special prerogative. . . . If the devotees of every one of our countless human

⁴ The true view seems to be that consent does not *create* the privilege, which arises rather out of the common interest between the stewards and the racing public, but that the foundation of the privilege in this instance is that there has been a proper inquiry: see *per* Denning L.J., in *Russell v. Duke of Norfolk* [1949] 1 All E.R. at p. 119.

⁵ [1948] Ir.R., at pp. 257-8.

⁶ *Ibid.*, p. 258.

⁷ *Ibid.*, p. 261.

⁸ Cf. *infra*, where the question whether the requirement of a fair hearing is dependent upon the rules to which the plaintiff has submitted himself, is further considered.

⁹ [1948] Ir.R., pp. 266-7. It is not altogether clear from Black J.'s judgment whether he regarded the question of compliance with natural justice as distinct from the issue of malice, or merely as a mode of proving malice (cf. *ibid.*, pp. 270-1, and 274-7). Cf. Maguire C.J., at p. 254.

¹⁰ As Black J. pointed out (*ibid.*, pp. 273-4) there are unfortunately some dicta in *Chapman v. Ellesmere* which countenance this wide doctrine (e.g., Lord Hanworth M.R. ([1932] 2 K.B., at p. 449) and Slessor L.J. (at p. 468)). These dicta are, moreover, difficult to reconcile with *Hope v. I'Anson*, *supra*.

pursuits could have their juntas of self-constituted inquisitors, privileged to ruin any citizen by publishing libels upon him as to his conduct in their own particular activity, to all persons interested in that activity, the victim having no redress unless he could prove malice, I think such a law might well make the country that possessed it an admirable one to live out of'.¹¹

Although not directly concerned with the question how far contract can afford a basis for the court's jurisdiction to enforce the rules of natural justice, it is thought that these dicta do go some way towards supporting the tendency to import those rules on the footing of an express or implied agreement.

At the present day, therefore, there is some ground for asserting that when a professional person is being excluded from pursuing his occupation (either because his membership has been cancelled or his licence to practise withdrawn) on some allegation of misconduct, the courts will interfere if the rules of natural justice are not complied with, at any rate on the basis of an implied term to that effect in the contract between the member and the society, and possibly even if there is no contract, on the broad ground that Equity will concede a remedy where there has been abuse of a discretionary power.¹²

(2) It will have been noted that in neither *Weinberger v. Inglis* nor in *Russell v. Duke of Norfolk* was it suggested that wrongful expulsion or withdrawal of a licence contrary to natural justice might be an independent tort and actionable as such. Authority on this point is meagre in the extreme and so far as it goes is rather against any such tort being recognised. The only reported case in which the plaintiff appears to have relied expressly on tort as a cause of action seems to be *Wood v. Woad*¹³ where the plaintiff was a member of a mutual insurance society from which he was expelled by the committee on the ground of his alleged misconduct. It was alleged against the committee that the plaintiff was condemned without being given any opportunity to be heard, as a result of which he lost the benefit of an indemnity for damage which his ship subsequently sustained. On demurrer, the declaration was held to disclose no cause of action. The real basis of the decision appears to have been that if, as the plaintiff contended, the expulsion was invalid the resolution expelling him was void and therefore no damage had been shown.¹⁴ Pollock B. pointed out that this was not a case within the principle of *Ashby v. White*¹⁵ where the mere infringement of a right¹⁶ entitled the

¹¹ [1948] Ir.R. at p. 275.

¹² If the body is a statutory one, jurisdiction will, of course, be based on the relevant statute.

¹³ L.R. 9 Ex. 190.

¹⁴ See at p. 198.

¹⁵ 2 Ld.Raym. 938.

¹⁶ For the limits of this principle see Clerk & Lindsell, *Law of Tort*, 10th ed., pp. 16-26.

plaintiff to maintain an action.¹⁷ Damages were the gist of the action and as against this no damage could result from a void act. Cleasby B., who concurred in the decision, nevertheless thought that the absence of damage was not a vital objection, firstly, because wherever there was a wrong there was in law a damage,¹⁸ and secondly, because the de facto exclusion resulting from the invalid resolution would be sufficient to entitle the member to maintain his action.¹⁹ It may be respectfully submitted that this is a rather more realistic approach than that of the majority of the court and, indeed, the latter seems to confuse the *legal* consequences of an act with the *factual* consequences. An act may be null and void in law but may have physical consequences which flow therefrom and result in damage to the victim of the act, as, for example, where a person without any legal right chooses to assert a title to goods, thereby depriving the lawful owner to some extent of his de facto enjoyment of the goods.²⁰ The real difficulty seems to lie in eliciting the principle upon which a duty was owed by the committee not to proceed to expel the member without a fair hearing. It must be confessed that it is not easy to see why in *Wood v. Woad* the plaintiff did not allege a breach of an implied contractual term to this effect. There seems, indeed, to be only one principle, and that of somewhat uncertain scope, that can be prayed in aid here, *viz.*, the oft-approved dictum of Bowen L.J. that at common law there is a cause of action wherever one person does damage to another *wilfully and intentionally* without just cause or excuse.²¹ That this is a residuary principle which is applied very cautiously and only in exceptional circumstances requires no emphasis, but since expulsion or exclusion from membership are always deliberate acts the rule does seem to be *prima facie* applicable. It is suggested, however, that even so the courts would not extend this rule to such a case as the present for this reason. Before it could apply there must be some *right* to membership established in law which has been infringed. It is difficult to see how such a right can in law arise otherwise than from a contractual relation.²² If, therefore, there is no contract there is no right infringed: if the right is *ex contractu* the court will not permit an action to be framed in tort for a mere breach of contract.²³ It might, however, be possible to

¹⁷ Cf. *Constantine v. Imperial Hotels, Ltd.* [1944] K.B. 693.

¹⁸ It may be thought that this rather begs the question, what is a 'legal wrong'? ¹⁹ L.R. 9 Ex. at p. 199.

²⁰ See *Oakley v. Lyster* [1931] 1 K.B. 148.

²¹ *Mogul S.S. Co. v. McGregor, Gow & Co.* (1889) 23 Q.B.D. 598, 613; *Skinner v. Shew* [1893] 1 Ch. 413, 422.

²² Where the expulsion has been effected in pursuance of a statutory power, *e.g.*, s. 13 of the Dentists Act, 1878, such a power being judicial and discretionary and not ministerial, no action for damages will lie in the absence of malice: *Partridge v. G.M.C.* (1890) 25 Q.B.D. 70. Cf. *Everett v. Griffiths* [1921] 1 A.C. 666.

²³ See *Parr v. Lancs. & Cheshire Miners' Fedn.* [1913] 1 Ch. 366; *Leslie v. Shiell* [1914] 3 K.B. 607; *Old Gate Estates, Ltd. v. Toplis* [1939] 3 All E.R. 209.

sue the committee or other executive body for procuring a breach of contract by the other members, with the aggrieved member.²⁴ Here again actual damage must be proved²⁵ but there seems no reason why de facto exclusion, or other temporal loss or inconvenience resulting from the invalid expulsion, should not be recoverable. But where the contract is not with the society as such but with the committee itself, e.g., in the case of a trainer's licence granted by the stewards of the Jockey Club, this cause of action would, of course, be inapplicable. Conspiracy, too, might avail as a cause of action, but here there is the difficulty, which would generally be insuperable, of showing a deliberate intention on the part of the defendants to injure the plaintiff rather than to protect the lawful interests of the society.²⁶

(3) Had it been recognised from the first that the jurisdiction was primarily founded upon a breach of contract between the society and the member or licence-holder it is conceived that the further step might well have been taken of importing an implied term²⁷ into all such arrangements, to the effect that expulsion or withdrawal of the licence should not be made save on reasonable grounds and that the court would be the final arbiter of what grounds were reasonable in the circumstances. Even in the case of master and servant the court will not, apart from an express provision in the contract of service, allow the master summarily to dismiss his servant without claiming the right, if its jurisdiction is invoked, to investigate the sufficiency of the reasons for dismissal relied upon by the master.²⁸ It is true that if the contract itself permits a purely arbitrary dismissal the court will give effect to this arrangement and will regard the grounds of dismissal, justified or unjustified, as immaterial.²⁹ None the less, as Denning L.J. observed in *Russell v. Duke of Norfolk*,³⁰ there may be important reasons why the court may grant less latitude to a

²⁴ *Semble*, if the body is incorporated it is not possible to rely on the committee having procured a breach by the corporation: see *Said v. Butt* [1920] 3 K.B. 497; *Henderson v. Kane* [1924] N.Z.L.R. 1073. But cf. *De Jellie Marks v. Greenwood* [1936] 1 All E.R. 863 at p. 872.

²⁵ See *Goldsohl v. Goldman* [1914] 2 Ch. 603.

²⁶ *Crofter Harris Tweed Co. v. Veitch* [1942] A.C. 435.

²⁷ The basis on which terms can be implied into a contract was laid down in *Re Notts and Cardiff Corpn.* [1918] 2 K.B. 146 at p. 168, *per* Pickford L.J.: 'This doctrine of implied terms must be confined to cases where the contract is silent on a term which is necessary in order to carry it out, and therefore must have been intended by the parties, and that it cannot be extended to introduce a term which may make that carrying out more convenient and might have been included if the parties had thought about it'. Cf. MacKinnon L.J.'s test of a suggestion by an 'officious bystander' where both parties would 'testily suppress him with a common "Oh, of course"': *Shirlaw v. Southern Foundries, Ltd.* [1939] 2 K.B. 206. Cf. *Kelly v. Battershell* [1949] 2 All E.R. 830 at p. 838.

²⁸ See *Clouston v. Corry* [1906] A.C. 122.

²⁹ But the court leans against construing a contract so as to confer such an arbitrary power: *Re African Assn., Ltd.* [1910] 1 K.B. 396.

³⁰ [1949] 1 All E.R. at p. 119.

body with the power of inflicting professional exclusion upon a member than is accorded to the purely economic relation of master and servant. This point will be adverted to under the next heading, but it may also be argued here that since there are instances³¹ where the courts will examine the sufficiency of the grounds of expulsion without it being found that such an inquiry is impracticable or in any way detrimental to the well-being or independence of the particular profession, equally the rules of contract should be wide enough to permit a full inquiry into an alleged breach of a valid agreement. The opinion may be ventured that the idea of professional jurisdiction being sacrosanct and unappealable is beneficial neither to the profession itself nor to the community as a whole. It must be admitted, however, that both common law and Equity have set their face against extending the grounds of their intervention beyond the narrow ambit of natural justice as recognised in the earlier authorities.

(4) If it now be the law that a person cannot be expelled from his professional society and that his licence cannot be withdrawn on the ground of his alleged misconduct, unless he is first given a fair hearing in accordance with natural justice, it remains to consider how far the need for such a hearing can be excluded by consent, e.g., by an express rule of the society permitting the committee to expel a member on any ground it sees fit without holding any inquiry or giving him an opportunity to be heard. On this matter there is some judicial conflict. In *Russell v. Duke of Norfolk* both Lord Goddard C.J.,³² and Tucker L.J.,³³ took the view that an express rule could obviate the necessity of complying with natural justice. Asquith L.J. was reluctant to construe the actual rules then before the court as conferring an absolute power of this character, but expressed no opinion on the validity of the rules assuming that they had purported to do so.³⁴ Denning L.J., however, doubted whether an express stipulation allowing the stewards to condemn a man unheard would be valid, and thought it would be contrary to public policy.³⁵ This view he based on the monopolistic nature of the Jockey Club's sphere of activity, which the learned Lord Justice thought differentiated the case from mere dismissal of a servant or the mere discretionary withdrawal of a licence or even expulsion from a club.³⁶ It does at any rate

³¹ E.g., in the case of solicitors, or the instances referred to *supra*, p. 282, note 6.

³² [1948] 1 All E.R. at p. 491.

³³ [1949] 1 All E.R. at p. 115. See also Black J. in *Green v. Blake* [1948] Ir.R. at pp. 266-7.

³⁴ *Ibid.*, p. 118.

³⁵ P. 119. Leading decisions on such instruments of monopoly as trade protection agreements (e.g., *Thorne v. Motor Trade Association* [1937] A.C. 797) seem to be rather against this dictum being upheld. Cf. *Thompson v. B.M.A.* [1924] A.C. 764.

³⁶ Other dicta favouring this view are to be gleaned from *Wood v. Woad*, *supra*, at p. 196 (Kelly C.B.); *Dawkins v. Antrobus*, *supra*, at p. 630 (Brett L.J.);

seem clear that even if it is permissible to contract out of the rules of natural justice the court will not be satisfied with anything less than an express stipulation in clear terms to this effect.³⁷ On the other hand, if the society has power under its rules to exclude a member or withdraw a person's licence in its absolute discretion without giving any reasons, and it merely excludes him or withdraws his licence in purported pursuance of that power, that decision will be final and incapable of being impugned in the courts,³⁸ subject, however, no doubt to the power having been exercised honestly and in good faith.³⁹

(5) What remedies then are available to a person wrongfully expelled from his professional society, or whose licence to practice has been wrongfully withdrawn? The circumstances in which an injunction or declaration will be granted have already been examined. If, however, the wrongful act is a breach of contract the plaintiff may also be entitled to damages. In the absence of evidence of actual damage the plaintiff may still claim judgment for nominal damages, and such a judgment in a proper case may also carry costs.⁴⁰ Actual damage may include resultant loss of employment,⁴¹ or loss of a reasonable expectation of profit even though the plaintiff cannot show the loss of any specific bargain.⁴² But although the plaintiff may get damages arising from the mere reasonable expectation that had his membership continued or his licence not been withdrawn he would have made some profit,⁴³ if he is relying on any specific or calculable loss he will be well-advised to offer evidence of it and before he can do so particulars of such items of special damage must be pleaded in the usual way.⁴⁴ Exemplary damages cannot be awarded for a mere breach of contract nor for injury to reputation as such.⁴⁵ Nevertheless, actual pecuniary loss sustained through a loss of reputation caused by a breach of contract is apparently recoverable.⁴⁶ Thus though

and *Allinson v. General Medical Council* [1894] 1 Q.B. 250 at pp. 257-9 (Lord Esher M.R.). On the other hand in *Maclean v. Workers' Union* [1929] 1 Ch. 602 at pp. 623-4, Maugham J. thought that if a trade union had a rule giving the committee power to expel a member without his having an opportunity to explain his conduct, the court would not interfere on the ground of public policy, and Lord Goddard C.J. agreed with this view (*Russell v. Duke of Norfolk* [1948] 1 All E.R. at p. 491).

³⁷ Cf. *per* Maugham J. in *Maclean v. Workers' Union*, *supra*, at p. 623.

³⁸ See *Wood v. Woad*, *supra*, at p. 196, *per* Kelly C.B.

³⁹ Cf. *Weinberger v. Inglis* [1919] A.C. at pp. 626, 644; *R. v. Paddington Rent Tribunal*, *ex p. Bell London Properties, Ltd.* [1949] 1 All E.R. 720.

⁴⁰ *Young v. Ladies' Imperial Club, Ltd.*, *supra*, at p. 536.

⁴¹ Cf. *Howard v. Odhams Press* [1938] 1 K.B. 1.

⁴² *Simpson v. L.N.W. Ry.* (1866) L.R. 1 Q.B. 274.

⁴³ *Russell v. Duke of Norfolk*, *supra*, *per* Lord Goddard C.J. in his summing-up to the jury.

⁴⁴ *R.S.C.*, O. 19, r. 7; *Ratcliffe v. Evans* [1892] 2 Q.B. 524.

⁴⁵ *I.e.*, where the claim is in contract and not for defamation: see *Addis v. Gramophone Co.* [1909] A.C. 488.

⁴⁶ See *Foaminol, Ltd. v. British Plastics, Ltd.* [1941] 2 All E.R. 393, 399-400 (Hallett J.), and *Aerial Advertising Co. v. Batchelors Peas, Ltd.* [1938] 2 All E.R. 788, 795-7 (Atkinson J.).

a trainer, whose licence has been wrongfully withdrawn, could not get damages based on a breach of contract merely on the ground that reasonable people have assumed that he has been guilty of misconduct, with consequent injury to his reputation, both as a man and a trainer, this rule would not prevent him recovering damages in respect of a falling-off of business, either general or specific, resulting from his lowered reputation brought about by the wrongful expulsion. To maintain a claim to damages of this kind the plaintiff must prove with sufficient certainty the occurrence of the pecuniary loss, and also prove that such loss was within the contemplation of the defaulting party at the time the contract was made; otherwise it will be too remote.⁴⁷ It is conceived that so far as the second of these points is concerned little difficulty would be experienced in showing that loss of professional earnings, owing to a withdrawal of membership or a licence to practice, was within the contemplation of the parties at all material times.

Where the body exercising the disciplinary powers is constituted by statute, or its powers are derived from or controlled by statute, the aggrieved member may apply to the Divisional Court for an order of certiorari to quash the decision.⁴⁸ But since the court will only consider whether the body has acted within its powers and in accordance with natural justice, the distinction between this course and an action for an injunction is purely procedural.

It will have been apparent from the foregoing review that the courts have shown a continued reluctance to intervene in disputes which they regard as essentially domestic in character.⁴⁹ And although there are signs in the later cases of a broadening of the basis of the court's jurisdiction it still remains true that the common law rules make no provision for anything in the nature of a rehearing of a decision of a domestic tribunal. Inasmuch as the common law courts have extended these principles over the whole range of quasi-judicial functions, of which modern administrative law has been so fertile a creator, the need for a right of appeal from professional disciplinary bodies can hardly be viewed in isolation from the wider background. None the less a distinction is now recognised between the activities of bodies which are no more than an instrument of effecting a particular line of governmental policy, such as a tribunal of inquiry under the Town Planning Acts and the decision of the

⁴⁷ *Per* Hallett J. in *Foaminol, Ltd. v. British Plastics, Ltd.*, *supra*, at p. 400.

⁴⁸ *General Medical Council v. Spackman* [1943] A.C. 627. This procedure is generally alternative to a claim for an injunction: cf. *Leeson v. G.M.C.*, 43 Ch.D. 366. Lord Wright's observation in *Spackman's Case* (at p. 640) that certiorari is the only remedy available plainly is not directed to this alternative but to the grounds of the application, which are the same in either case and do not extend to an appeal on the facts. *Aliter*, where there is express provision for an appeal by statute (cf. *supra*, p. 282, note 6).

⁴⁹ I have ventured to remark elsewhere on this judicial trend in relation to administrative matters generally: see 'Ministers' Powers and the Courts' in *Current Legal Problems* (1948), pp. 89 *et seq*

Minister thereon,⁵⁰ and those which involve a genuine *lis inter partes*,⁵¹ such as the decision of a Pensions Appeal Tribunal. In the former example the tribunal is probably performing no more than an informative function, enabling a Minister to test the strength of local opposition, or to assess the weight of criticism which might be advanced against particular proposals, and to assist him to make up his mind as to the correct policy to pursue.⁵² In the latter case, on the other hand, there is a clearly triable issue to be determined on proper evidence after due inquiry by applying the appropriate provisions of the law.

The machinery of the Pensions Appeal Tribunal Act, 1943, provides for an appeal on questions of fact to a special tribunal, with a further right of appeal on an issue of law to a selected judge of the High Court as a court of last resort.⁵³ This procedure has worked well both in ensuring substantial justice and in establishing a 'jurisprudence' to guide the inferior tribunals. [Nevertheless, it must be recognised that in the case of professional and similar bodies there is little scope for an appeal on a ground of law, and to have any efficacy provision would need to be made for what would in effect be a re-hearing.] It is hardly likely that a new tribunal would be created for this purpose and present indications are, as witness the recent controversy between the British Medical Association and the Minister of Health over the right of appeal of a doctor excluded from the National Health Service,⁵⁴ that official quarters are no more anxious to confer such jurisdiction on the courts than the courts have proved themselves eager to assume it.⁵⁵ Even the imposing of a reasonable set of rules to govern such proceedings coupled with a limited power of judicial review on the lines of the admirable U.S. Federal Administrative Procedure Act, 1946,⁵⁶ seems more than can be hoped for, in view of the diversity of the different types of bodies which would have to be envisaged and the

⁵⁰ See *Robinson v. Minister of Town and Country Planning* [1947] K.B. 702. Here, although the inquiry has to be conducted on quasi-judicial principles, the issue is really one of policy rather in the nature of a judicial dispute. The decision of the Minister is regarded as a purely executive act: *ibid.*, at p. 716. Cf. Denning, *Freedom under Law*, at pp. 76, 115-122.

⁵¹ Cf. *Errington v. Minister of Health* [1935] 1 K.B. 249 at p. 271.

⁵² *Per* Sir Hartley Shawcross in address to Annual General Meeting of Bar, 1948, 205 L.T.Jo., at p. 220.

⁵³ See ss. 1, 2, 3, 4, 5 (2).

⁵⁴ For the power of removal of a medical practitioner from the National Health Service and his right of appeal to the Minister of Health, see SI 1948, No. 507, regs. 4-9. The Minister's decision is final and conclusive, subject to compliance with 'natural justice'. The procedure on the original hearing before the statutory committee is set out in the First Schedule of the above SI.

⁵⁵ But note that under the Legal Aid and Advice Act, 1949, a barrister or solicitor is given a right of appeal to the High Court if he is aggrieved by a decision excluding him from a legal aid panel: s. 6 (3). And cf. the provisions of the new Medical Bill, referred to *supra*, p. 282, note 5.

⁵⁶ See ss. 5-8. The Act only applies to governmental agencies (s. 2 (a)), but a decision of such a body may be set aside on judicial review if it is 'unsupported by substantial evidence': s. 10 (e).

difficulty of framing general legislation appropriate to them collectively. In effect, the matter is one eminently suitable for the application of the basic common law standard of what is reasonable and it must be a source of regret that the common law in modern times has not proved sufficiently pliable to adapt that standard to the review of professional bodies exercising disciplinary powers. Speaking of the case of a doctor removed from the National Health Service on the ground of negligence causing the death of a patient, from which decision an appeal would lie only to the Minister of Health, Denning L.J. has recently commented : ' No more serious verdict could well be given affecting a professional man. Issues of that kind are repeatedly tried in the courts before a judge and jury and often reach the Court of Appeal. It is a new thing to have questions of this kind authoritatively determined by a Minister—which means by the officials of his department '.⁵⁷ Yet this criticism must inevitably lack some of the cogency it would otherwise possess while, in the sphere of professional discipline, the law in effect permits such vital matters to be decided by domestic tribunals without the possibility of any appeal whatsoever.

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⁵⁷ *Freedom under the Law*, p. 95.

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RES JUDICATA IN RECENT CASES

THE doctrine of *res judicata* has been applied in several cases in the last few years, and the purpose of this article is to consider these recent decisions. The doctrine has been described by Spencer Bower¹ as applying to 'a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto'. The cases to be discussed relate to different parts of this description, and will be considered under the following heads: (1) the persons estopped; (2) the subject-matter of the estoppel; (5) the form of the previous decision; (4) the authority of the court. Although the cases turn on different points, there is an underlying unity between them—they all involve an attempt to relitigate in some way. This is exactly what the doctrine of *res judicata* is designed to prevent, and in so far as it has achieved this end, its operation may be regarded as satisfactory. Often, however, the application of the strict rules leaves one in doubt as to the merits of the doctrine in its present form. As Somervell L.J. observed not long ago,² *res judicata* may work in mysterious ways.

(1) *The persons estopped.*

Where the judgment is in rem, there is no difficulty in determining the persons estopped. The whole world is bound by the judgment, so that 'a person relying upon a decision of this kind as a *res judicata* is not concerned with any question of the identity of parties or privies'.³ But where the judgment operates in personam, it is not always easy to determine who should be affected by the estoppel. The rule is that only the parties and their privies are bound. The decision in *Re Waring* [1948] Ch. 221 shows that its application may lead to curious results. The trustees of a will asked the court to determine whether two annuitants, to whom tax-free annuities had been given by the testator, should be paid the annuities in full or subject to the deduction of a portion thereof for tax under the Finance Act, 1941, as amended by the Finance (No. 2) Act, 1945. The Court of Appeal had considered the same question in 1942 with regard to the same will (*Re Waring* [1942] Ch. 426), and had decided that section 25 of the Finance Act, 1941,

¹ G. Spencer Bower, *The Doctrine of Res Judicata*, 1924, at p. 1. This is the only published monograph on the subject. See also Everest and Strode, *Law of Estoppel*, 1923. Ewart on *Estoppel*, 1900, is not very helpful in this connection.

² Quoted by Evershed M.R. in *Remnant v. Savoy Estate, Ltd.* [1949] 2 All E.R. 286 at p. 289.

³ Bower, *op. cit.*, p. 133.

applied. Later, in another case, *Berkeley v. Berkeley* [1946] A.C. 555, the House of Lords overruled the 1942 decision on the applicability of section 25 of the 1941 Act to such facts. Also the section was amended by section 20 of the Finance (No. 2) Act, 1945. The trustees now sought guidance as to the proper course to take in the light of the decision of the House of Lords and the amendment to the statute. Only one of the two annuitants involved had been made a party to the 1942 application, as the other was abroad in enemy-occupied territory at the time.⁴ In these circumstances Jenkins J. held that the annuitant who had been a party to the 1942 application was bound by the order of the court and could not re-open the matter, 'on the well-recognised principle of *res judicata*'. The other annuitant, not being involved in the 1942 decision, got the benefit of the change in the law. The result appears to be hard on the first annuitant. He had had his day in court, and could not avail himself of the benefit of a different view of the law arrived at later as a result of further judicial consideration of the matter in the House of Lords. *Res judicata* applied to preclude him. The other annuitant, not being a party or privy to the first proceeding, was in a more fortunate position. As counsel for the first annuitant pointed out, no doubt the testator intended the tax-free annuitants to be in the same position, and the learned judge admitted that the result appeared anomalous and that he had a good deal of sympathy for the first annuitant. But he made it clear that the question before him was 'not merely how the matter ought to be dealt with if it could be dealt with *de novo*, but the extent to which it can be dealt with *de novo* having regard to the judgment of the Court of Appeal applicable to this very estate'.⁵ The only way to avoid inequitable results such as occurred in *Re Waring* would appear to be by ensuring that all interested parties are joined in the first action.

The desire to relitigate matters, which is the source of most *res judicata* situations, is common where there has been, as in *Re Waring*, a change of law. Relitigation is not possible between the same parties in respect of the same subject-matter.⁶ But where the parties are *different*, the same subject-matter may be relitigated without objection. This is shown by the result of *Re Waring* as affecting the second annuitant, and by the case of *Lazarus-Barlow v. Regent Estates Co., Ltd.* [1949] 2 All E.R. 118.

The question in this case related to the determination of the standard rent of premises under the Rent Acts. In 1944 the first tenant had failed to establish that he was a protected tenant under the Rent Acts, and the landlords were given possession. They then relet the premises to the second tenant at an increased rent. In

⁴ The court had refused to make a representation order so as to bind this annuitant.

⁵ At p. 227.

⁶ For relitigation with regard to different subject-matter, *vide infra*.

1949 this second tenant sought to have the standard rent determined under the Rent Acts. Between the 1944 case and that in 1949 there had been a change in the law with regard to the protection under the Rent Acts of premises let partly furnished or with services.⁷ Nevertheless the county court judge felt unable to disregard the 1944 decision to the effect that the premises were then unprotected, and he fixed the standard rent as that commencing with the new tenancy in 1945. The Court of Appeal held that this decision was erroneous, for the 1944 decision was not binding on the present tenant. He was neither party nor privy thereto (he was not a successor in title), and when it was said that the Rent Acts operated 'in rem', this did not mean that the 1944 judgment had the effect of determining the status of the flat at that date as against the whole world. The relief available to the second tenant as a result of this decision could not fail to appear galling to the first tenant to whom it had not been available at the time of his action, and the attention of the court was drawn to the inconvenience and hardship of allowing the re-opening of the matter. Evershed L.J. observed however that the argument of inconvenience and hardship could not prevail.⁸ The doctrine of *res judicata* is not to be extended in scope beyond its settled limits.

(2) *The subject-matter of the estoppel.*

To constitute an estoppel *per rem judicatam*, there must be identity of subject-matter. This comprises, as Bower explains, 'not only identity of subject-matter in a physical sense, but also identity of subject-matter in a juridical sense, identity of the question or issue raised'.⁹

The presence of identity of subject-matter in the physical sense prevented the plaintiff in *Remnant v. Savoy Estate Ltd.* [1949] 2 All E.R. 286 from claiming the furniture claimed on a previous occasion in her second action. The facts were that in 1943 the plaintiff sought the delivery up to her of certain furniture specified in an inventory, which she alleged she had loaned to a company in regard to which a receiver had been appointed. She failed to establish her claim, and in 1945 took out a second summons claiming the furniture specified in the inventory along with other furniture. With regard to the furniture in the inventory, the claim was dropped as it was met with the defence of *res judicata*. The Court of Appeal concurred in the course taken with regard to this part of the claim.¹⁰

Identity of subject-matter in the juridical sense means that the

⁷ As a result of the decision in *Palser v. Grinling* [1948] A.C. 291.

⁸ At p. 125.

⁹ Bower, *op. cit.*, p. 115. Roman law has different terms for the two, *viz.*, *eadem res* and *eadem quaestio*.

¹⁰ Cf. *Archer-Shee v. Garland* [1931] A.C. 212, in which case the plaintiff sought relief in a fresh action which he had failed to get in his original case, and the necessity of avoiding identity of subject-matter forced him to base the claim on different taxation years.

same issue must be raised in a subsequent proceeding which was determined in the previous case. In both judgments in rem and in personam, the estoppel as to subject-matter includes not only the matters actually decided in the previous case, but the necessary grounds of the decision as well.¹¹ In *Re Koenigsberg* [1949] 1 All E.R. 804 some difficulty was experienced in determining whether a particular assumption was or was not a ground of a previous decision. The assumption related to the applicability of that section of the Finance Act, 1941, which, as we have already seen, concerns the taxation of annuitants. The Public Trustee applied to the court in 1943 to determine who should bear his income fee, and in his application he stated his assumption that section 25 of the Finance Act, 1941, applied. The evidence showed that if it did not apply then the assets of the estate would be insufficient to meet the annuities and also provide for the immediate payment of the pecuniary legacies. At the time of this application *Berkeley v. Berkeley* had not yet been decided. Because of the decision in *Berkeley's Case*, an attempt was now made by the annuitants to have the matter re-opened, so that they might have the benefit of the sums named in the will paid free of tax. Roxburgh J. held that it was impossible to start fresh litigation on the strength of the House of Lords decision. On the previous occasion there had been an undisputed assumption that section 25 applied, which was fundamental to the court's decision, and the matter was therefore res judicata. The Court of Appeal took a different view, and reversed the decision of the court below. They considered that the former summons had only raised the question as to how the income fee of the Public Trustee was to be dealt with, the point as to the application of section 25 was not put before the court for decision, and the defendants were under no duty to raise it, in the sense that, if they did not do so, they would not be allowed in future to assert their rights under the law as it was subsequently held to be. The matter was not res judicata, and the law laid down in *Berkeley's Case* should be applied to the annuities under the will.

This case is straightforward enough, the sole question being whether or not the subject-matter had formed the ground of the previous decision. Once again, however, the legal issue cloaked an attempt to get round a previous decision given when a different view of the law prevailed.

No question of change of law arises in the next three cases to be discussed, but in each case the subject-matter of the case in the juridical sense was involved.

In the case of *Greenhalgh v. Mallard* [1947] 2 All E.R. 255 the plaintiff sought damages for conspiracy in two successive actions.

¹¹ See Lord Shaw in *Hoystead v. Taxation Commissioner* [1926] A.C. 155 at p. 170, to the effect that the estoppel 'extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision'.

In the first he alleged a combination for an unlawful purpose, and he was unsuccessful. He then alleged a combination employing unlawful means. The Court of Appeal upheld the master's order striking out the statement of claim. This was an exercise by the court of its inherent power to protect itself and its process from abuse. As a writer in the *Solicitor's Journal* has pointed out, 'an action or plea may be struck out on the ground that some fact or state of facts which it is essential for the party to establish is, as between the parties, *res judicata*'. Again, the case 'concerns the question of the scope of a *res judicata* plea not as regards the parties between whom it is raised, but as to the degree of identity or correspondence necessary between the subject-matter of the record which it is sought to plead and the subject of the subsequent litigation against which the plea is raised'. *Greenhalgh v. Mallard* 'emphasises the adjectival nature of the *res judicata* principle, since it shows it in relation to a rule of practice—that concerned with the striking out of a pleading'.¹²

Exactly the same might be said about *Wright v. Bennett* [1948] 1 All E.R. 227, where the facts were essentially similar. The defendants applied to have the statement of claim in the second action struck out on the grounds that it was frivolous and vexatious. The Court of Appeal once more upheld the master's order, and Tucker L.J. remarked that *res judicata* and the staying of vexatious actions 'are inclined to overlap each other'.¹³

In criminal cases, the success of a defence of *autrefois acquit* or *convict* depends on satisfying similar requirements to those laid down in civil cases by the doctrine of *res judicata*.¹⁴ There must be identity of parties, and of subject-matter. With regard to the latter requirement, it must be shown not merely that the facts necessary to support the second prosecution were the same facts as in the first prosecution (physical identity) but that the offences are identical (juridical identity). This was strikingly demonstrated by the decision of the Court of Criminal Appeal in *R. v. Thomas* [1949] 2 All E.R. 662. There the appellant was convicted of wounding his wife with intent to murder her, and sentenced to seven years' imprisonment. A month after this conviction the wife died from her wounds, and he was then indicted for murder. A plea of *autrefois convict* was not sustained by Devlin J., and the Court of Criminal Appeal dismissed the appeal. As Humphreys J. explained, the common law rule is that a person may not be punished twice for the same offence. It was not the law, and never

¹² 91 S.J. 592, in an article entitled 'Striking out and *Res Judicata*'. With regard to the adjectival nature of *res judicata*, Evershed M.R. in *Remnant v. Savoy Estate, Ltd.*, *loc. cit.*, felt that this enabled him to look at the substance of the competing claims, and he remarked at p. 290 that 'the principle of *res judicata* is, after all, a rule of evidence'.

¹³ At p. 230.

¹⁴ The similarity was recently the subject of comment by a Canadian judge in *Re Wilson* [1948] 1 W.W.R. 680 (B.C.).

had been, that a person should not be liable to be punished twice for the same act.¹⁵

MATRIMONIAL CAUSES

Magistrates often have before them in domestic proceedings charges which later form the basis of divorce actions, and the question which consequently arises is whether the findings of the magistrates are to be regarded as effecting an estoppel in the Divorce Court. The courts have experienced great difficulty in applying the doctrine of *res judicata* to such circumstances, but its scope has recently been 'illuminated and clarified by . . . judicial pronouncement'.¹⁶ The cases concern both the form of the decision in the previous hearing, and the authority of the court.

(3) *The form of the previous decision.*

A court before which some domestic proceeding is commenced may take any one of three courses : (i) it may find the case proved ; (ii) it may dismiss the case ; (iii) it may allow the case to be withdrawn. We shall consider whether any of these courses if adopted makes the matter *res judicata* in a subsequent divorce action.

Perhaps the best way of approaching the recent cases is through the medium of the learned judgment of Bucknill L.J. in *Winnan v. Winnan* [1948] 2 All E.R. 862, where the matter is extensively discussed in a most lucid fashion. The facts of the case were that the wife, preferring feline company to the society of her husband, kept twenty-five to thirty cats. The husband left her and sought a divorce on the grounds of cruelty by the wife in the past coupled with present constructive desertion. The allegations as to constructive desertion had been pleaded by the husband in defence in a former proceeding before magistrates in which the wife had summoned the husband for wilful neglect to maintain. She had been successful in that case, and she now argued that the allegations as to desertion were *res judicata*. The Court of Appeal held that, although the magistrates must have applied their minds to the question of constructive desertion, as this was a defence to a charge of wilful neglect to maintain, and their order therefore in effect decided that the wife was not guilty of constructive desertion, yet the allegations as to desertion in the divorce petition had not thereby become *res judicata*. Bucknill L.J. examined the precedents with regard to the two following situations :

(i) Where there is a previous finding that a matrimonial offence is proved. It is now settled that in such a case the Divorce Court will not regard itself precluded from re-opening the matter. *Harri-man v. Harriman* [1909] P. 123, which is the authority on this point, is now reinforced by *Kara v. Kara* [1948] P. 287. In the latter case the husband petitioned for divorce on the ground

¹⁵ At p. 664.

¹⁶ *Rayden on Divorce*, 5th edition, 1949, preface.

of the wife's adultery. The husband's petition was refused, and the wife's cross-petition on the ground of cruelty was allowed. The Court of Appeal reversed the finding. The wife had previously taken out a summons against the husband alleging cruelty, and this was based on the same facts as those now alleged in her divorce petition. She had obtained a court order in her favour. The Court of Appeal held that this finding of cruelty by the stipendiary magistrate, though of strong probative value, did not estop the Divorce Court from finding that there had been no cruelty.

(ii) Where there is a previous finding of innocence with regard to a matrimonial offence. The position here has been the subject of some doubt, but *Winnan's Case* has cleared the air. In *Finney v. Finney* (1868) L.R. 1 P. & D. 483 a wife had on a previous occasion petitioned for judicial separation on the ground of cruelty, and her petition had been dismissed. She later petitioned for divorce on the same ground, and the husband objected to the same allegation of cruelty being raised a second time. Lord Penzance upheld the husband's objection. A strenuous attempt was made by counsel in *Winnan's Case* to extend the effect of this decision so as to curtail the Divorce Court's freedom of inquiry where there have been previous proceedings—to confine it to cases where there has been a previous finding of a matrimonial offence proved and to exclude cases where the spouse has already been acquitted of the offence charged. Ammunition for this attempt was provided by two judgments in which Lord Merriman P. had canvassed the possibility of a different rule applying to findings of innocence from that established as applicable to findings of a charge proved, viz., *James v. James* [1948] 1 All E.R. 214, at p. 217, and *Hudson v. Hudson* [1948] 1 All E.R. 773, at p. 775. The attempt was not successful, for, as Bucknill L.J. pointed out, 'there is no direct authority for this proposition'.¹⁷ The case cited by Lord Merriman was *Pratt v. Pratt* (1927) 137 L.T. 491. The facts were that a court of summary jurisdiction had found the wife guilty of adultery and had accordingly revoked a separation order previously made in the wife's favour. The Divorce Court dismissed a petition by the husband for divorce on the grounds of adultery, and the magistrates subsequently restored the separation order upon the wife's application. Bucknill L.J. in *Winnan's Case* expressed the view that *Pratt v. Pratt* 'seems to show that the finding of the judge of the High Court that the wife had not committed adultery is res judicata and conclusive in subsequent proceedings before a court of summary jurisdiction'. Nevertheless 'it does not decide that, if there had been a previous finding by the court of summary jurisdiction that the wife had not committed adultery, such finding would have estopped the husband from petitioning for divorce on the ground of the same adultery'.¹⁸

¹⁷ At p. 867.

¹⁸ At p. 868. Lord Merriman in *James v. James*, loc. cit., thought that *Pratt v. Pratt* went the whole length of supporting his contention.

The learned judge implied that in such a case there would be no estoppel of the Divorce Court, but he decided the case actually before him on another ground, the interpretation of the Matrimonial Causes Acts, 1857 and 1937. He did not find it easy 'to give any clear-cut reason why the rule of *res judicata* should not apply here' but was satisfied that 'those who first formulated the rule never intended it to apply to such a case as this'.¹⁹

It will be seen that the Divorce Court holds itself free to decide cases coming before it on the merits in accordance with the statutory duty laid upon it, irrespective of whether there has been a previous finding, whether of guilt or innocence, by magistrates in a court of summary jurisdiction.²⁰ It remains to consider the third course which might be taken in domestic proceedings before magistrates:

(iii) Where a charge made before magistrates of a matrimonial offence has been withdrawn. It is now established that this does not create an estoppel, whether the withdrawal is conditional or unconditional. Where the withdrawal is conditional upon the court dealing with the major charge forthwith, *res judicata* does not apply to prevent the withdrawing party later raising the same charge. This can now be stated on the authority of *Molesworth v. Molesworth* [1947] 2 All E.R. 842. The facts of that case were that in March, 1947, the wife summoned the husband for wilful neglect to maintain. This charge was later dropped and replaced by one of desertion, which was dismissed. In June, 1947, the wife summoned the husband again, this time alleging desertion as well as wilful neglect to maintain. The magistrates in their deliberations refused to take into account facts before March, 1947, and dismissed the summonses. It was held by a Divisional Court (1) that on the issue of wilful neglect to maintain, the withdrawal of the allegation in March did not estop the wife from making a similar allegation in June, because, in Lord Merriman's words 'it is clear to my mind that the question of wilful neglect to maintain has never been adjudicated upon'²¹; (2) that with regard to the charge of desertion, the magistrates in dismissing the charge wrongly excluded the matrimonial history prior to the first hearing as being *res judicata*. The case was remitted to the magistrates for rehearing, the court pointing out that the doctrine of *res judicata* should not be pressed too far.²² Lord Merriman expressed his determination that 'this matter shall be tried by a court which does not sit . . . in blinkers'.²³ The decision on this second point bears out the view of Bucknill L.J. in *Winnan's Case* that a prior dismissal of a charge does not make the matter *res judicata*. This

¹⁹ At p. 869.

²⁰ See on this matter generally, 93 S.J. 297, and 113 J.P.Jo. 279.

²¹ At p. 844.

²² The decision in *Breakwell v. Breakwell* [1947] W.N. 249 appears to be contrary to *Molesworth's Case* on this point.

²³ At p. 845.

is so even where both cases are heard by magistrates, providing the offence charged is of the nature of a continuing offence as in cases of desertion and persistent cruelty, because it is desirable for the court in such cases to be free to consider the whole course of conduct of the parties.²⁴

Where the withdrawal is unconditional it had been supposed for many years that *Pickavance v. Pickavance* [1901] P. 60 decided that the matter of the summons became res judicata.²⁵ This 'gloss' on that case, as Lord Merriman has described it, was finally exploded in *Land v. Land* [1949] 2 All E.R. 218. The falsity of this view has there been ably exposed by the learned President, and the misconception is laid to rest with the following epitaph: 'In my opinion, to hold that for some reason peculiar to matrimonial causes a withdrawal, not leading to an adverse adjudication, but a mere withdrawal, whether on a preliminary point or during the hearing of a case, operates in any sense as an estoppel per rem judicatam would be to place the matrimonial jurisdiction in a state of unwarranted isolation in the general system of law'.²⁶

This remark may well be justifiable in so far as it refers to the need to bring matrimonial causes back into line with the general law with regard to the effect of the withdrawal of an action. But the result of the latest decisions with regard to previous findings by magistrates' courts concerning matrimonial offences is in fact to place such matrimonial causes in a special class, or to use Lord Merriman's words, the effect is 'to place the matrimonial jurisdiction in a state of . . . isolation' from the general law. Decisions by magistrates' courts will not bind the Divorce Court, and yet the general law is that decisions of inferior tribunals give rise to estoppel just as much as those of superior tribunals. As Bower puts it, 'the decision of the very lowest civil tribunal is, if conclusive at all, conclusive in the very highest'.²⁷ It may be conceded, however, that the special position thus afforded to matrimonial causes is not 'unwarranted'. There is obviously much to be said for refusing to tie the hands of the Divorce Court, which is charged with the solemn duty of adjudicating in petitions for dissolution of marriage.

(4) *The authority of the court.*

The matrimonial cases already discussed may also be viewed from the point of view of the authority of the court. Bower's definition of res judicata requires an adjudication 'pronounced by a judicial tribunal having competent jurisdiction over the cause or

²⁴ See two articles in 92 S.J. pp. 61, 90, on *Molesworth's Case*. Where the period of the second summons is quite different, there is obviously no difficulty in deciding that the matter is not res judicata. See *Davies v. Davies* [1947] W.N. 4. For a case of estoppel, see *Stokes v. Stokes* [1911] P. 195.

²⁵ In *Hopkins v. Hopkins* [1914] P. 282 the court was mistaken as to the effect of the *Pickavance Case*.

²⁶ At p. 225.

²⁷ *Op. cit.* at p. 16.

matter, and over the parties thereto'. As we have seen the jurisdiction of the magistrates in domestic proceedings overlaps that of the Divorce Court in matrimonial causes, with the result that *res judicata* situations often arise. The position may be analysed as follows:

(i) Where in a divorce suit it is shown that there has been a previous decision of the Divorce Court with regard to the same matter, then the court will not allow the matter to be relitigated before it. This can be stated on the authority of *Finney v. Finney*, where the question of cruelty had been adjudicated upon in a previous suit for judicial separation, and the court refused to allow the same allegations to be investigated a second time.

(ii) Where in a divorce suit it is shown that there has been a previous decision of the magistrates' court with regard to the same matter, in such a case the Divorce Court is not bound by the previous decision, even though it has been affirmed by a Divisional Court.²⁸ In this connection no distinction is to be drawn between findings of guilt or innocence,²⁹ and the withdrawal of a summons is no exception.³⁰

(iii) Where in proceedings before magistrates it is shown that there has been a previous decision of the Divorce Court with regard to the same matter, *Pratt v. Pratt* is authority for saying that in such case the decision of the Divorce Court will be respected by the magistrates. As Bucknill L.J. explained in *Winnan's Case*, *Pratt v. Pratt* shows that the finding of the judge of the High Court that the wife had not committed adultery was *res judicata* and conclusive in subsequent proceedings before a court of summary jurisdiction.

(iv) Where in proceedings before magistrates it is shown that there have been previous proceedings before a court of summary jurisdiction with regard to the same matter, it does not follow that *res judicata* applies. Whether the matter must be treated as being *res judicata* or not depends on the nature of the charge involved. If it is in the nature of a continuing offence facts prior to the previous adjudication ought not to be excluded from the purview of the court in the second proceeding, for the matter can only be judged in the light of the whole course of conduct of the parties.³¹ Otherwise *res judicata* applies.³²

To sum up, the recent cases involving *res judicata* fall into two groups: (a) there are cases which represent nothing more than an application of well-known principles; (b) there are cases which provide new judicial departures. To the former group belong the cases

²⁸ See *Hudson v. Hudson* [1948] 1 All E.R. 773.

²⁹ *Kara v. Kara* [1948] P. 287; *Winnan v. Winnan* [1948] 2 All E.R. 862.

³⁰ *Molesworth v. Molesworth* [1947] 2 All E.R. 842; *Land v. Land* [1949] 2 All E.R. 218.

³¹ *Molesworth v. Molesworth*, second point.

³² *Stokes v. Stokes* [1911] P. 195.

with regard to parties and subject-matter. The latter group comprise the matrimonial causes; and with regard to these it may be said that they are in a special class in that it by no means follows that the rules there developed are of general application, or that the general rules of *res judicata* are there applied. Moreover in this connection there have been some noteworthy contributions to the law in the recent cases.

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LIMITATIONS ON THE CONTRACTUAL LIABILITY OF PUBLIC AUTHORITIES

I

THERE may seem to be little profit to be gained from an attempted re-examination of the alleged limitations on, or special privileges of, public authorities, and in particular the Crown, in relation to their contracts. Many of the rules have long since been regarded as settled law, such as the inherent right of the Crown to dismiss its servants at pleasure,¹ so that a challenge appears futile, and others, such as the supposed principle of *Churchward v. The Queen*,² seem of slight importance since they have been so rarely invoked in this country, though it is true that they have been more widely discussed in the Dominions.³ Nevertheless, the re-examination seems justified in view of the present increase in the scope of the activities of public authorities both in the strict field of government and also in nationalised industries and public boards, particularly when regard is had to the uncertainty surrounding some of the suggested limitations as a result of the various and sometimes conflicting reasons advanced in support of them. Uncertainty can itself be more harmful than an objectionable but clear rule. Added point is also given by the revival, in *Robertson v. Minister of Pensions*,⁴ of the claim by the Crown to an unfettered freedom of executive action, overriding any purported agreements in restraint of it. This was a claim upheld in *The Amphitrite*⁵ but which since 1921 had not again been advanced and could be treated as doubtful.⁶ Moreover it is only by determining the precise basis of some of these special rules relating to the contracts of public authorities that their probable application to new public corporations can be gauged.⁷

The most important, since capable of the widest application, of these special rules is that of *The Amphitrite*⁵ namely that 'it [the Crown] cannot by contract hamper its freedom of action in matters

¹ See *Robertson, Proceedings against Crown*, p. 355.

² (1865) L.R. 1 Q.B. 173.

³ See, for example, the cases discussed in *N. S. W. v. Bardolph* (1935) 52 C.L.R. 455.

⁴ [1948] 2 All E.R. 767.

⁵ *Rederiaktiebolaget Amphitrite v. The King* [1921] 3 K.B. 500.

⁶ Writing in 1948 Dr. G. L. Williams in his *Crown Proceedings* treated this decision as one unlikely to be followed and qualified the rule with the adjective 'supposed'.

⁷ The absurdity of some of the supposed bases if not their disproof is demonstrated by Dr. D. W. Logan in 61 L.Q.R., 'A Civil Servant and his Pay', at p. 240.

which concern the welfare of the State',⁸ a proposition for which the learned judge cited no authority but regarded as established or exemplified by the cases involving the right of the Crown to dismiss its servants at pleasure. The facts of that case are sufficiently well known, but it is perhaps worth summarising them. The owners of *The Amphitrite*, a Swedish ship, had before sending her to England in March, 1918, obtained from the British Legation at Stockholm an undertaking that the ship would 'earn her own release' if she carried a cargo of at least 60 per cent. approved goods. This undertaking was contrary to the normal practice, but without it it is apparent that the ship would not have sailed for England. After one voyage on which the undertaking was honoured a second voyage from Sweden to England was made but only after an express renewal of the former promise. On this occasion, however, the British Government refused clearance from the British port unless arranged through the Swedish Shipping Committee. The owners had, however, disintitiled themselves from applying to that Committee, the ship having formerly traded with Germany. Accordingly, the ship was detained and eventually sold because no release could be obtained despite the undertaking for the breach of which the owners now petitioned for damages. The fact that the dispute arose out of war-time conditions is one which is perhaps worth emphasis, but in view of the terms of the undertaking the fact that the owners could not apply through the appropriate committee does not seem material. In rejecting the claim for damages, Rowlatt J. denied that the agreement under which the ship had been sent to this country was an enforceable contract. He reduced it to an expression of 'intention to act in a particular way in a certain event' which could never be made binding on the Government. It is true that the learned judge admitted the possibility of the Government binding itself by a 'commercial' contract, a category which he did not define. It is, however, difficult at first sight to see why such contract should be outside the general rule which he had propounded, since it is easy to visualise State commercial transactions, now of everyday occurrence, which by reason of their size alone could affect the welfare of the State as much as the agreement before him, and yet this welfare of the State was apparently the overriding criterion. He buttressed his general rule with a discussion of the ability of the Crown to dismiss its servants at pleasure, despite any term to the contrary, an ability which he based on the same grounds, the interest of the community. The further examples given by Rowlatt J. go so far that it seems that in his opinion no term on which a Crown servant is employed could ever be enforced by the servant. In this it is submitted that he went too far since it will be contended that there is no insuperable obstacle in the way of the

⁸ Per Rowlatt J. at p. 503.

Crown making at any rate some terms in its agreements with its servants which are enforceable by them, and certainly those consequences which he suggested went far beyond anything which could be justified by the grounds upon which he based his argument. An alternative ground has been advanced as a possible legal justification for the repudiation of the undertaking given, in that case, 'on the highest authority with which it could be given on behalf of H.M. Government', namely the inability of a person to whom a discretion is entrusted to bind himself as to any future exercise of it.⁹ This may be an alternative way of saying the same thing in that this inability is required by the 'welfare of the state' but it is possibly an independent principle which can be construed out of Rowlatt J.'s reference to freedom of executive action. It is, however, a rule to which it will be necessary to revert in connection with other public authorities, and it is sufficient to note here that it is not the reason normally advanced in the Crown Servant cases on which Rowlatt J. relied and moreover it is one which would equally make it impossible, if taken literally, for the Crown to enter into a large number of, if not all, 'commercial' contracts relating as these must to matters in which the Government has at least a discretion whether or not to act, and as to its mode of action.

As it stands the difficulties of the decision arise from the uncertainties of its principle, and of its scope. Reliance has apparently only been placed upon it by the Crown in one case, and in others where there would seem to have been room for its operation, it has not been raised. Thus, for example, it was not raised in *The Steaua Romana*,¹⁰ a case arising in a similar state of emergency. There wireless apparatus was hired out and installed by a Belgian company in two Roumanian ships in October, 1940. Both ships were requisitioned by the Government of Kenya, and in June and July, 1941, the Ministry of Shipping agreed to hire the apparatus at existing rates. In December, 1941, after the outbreak of war with Roumania, both ships were de-requisitioned and then seized in prize. The question arose whether the apparatus was also to be condemned, and in rejecting the claim Lord Merriman P. observed (at p. 51) 'I decline to hold that His Majesty having been pleased through one officer to hire the apparatus would be capable of ordering another officer to seize these ships without implicitly excluding the apparatus so hired'; furthermore even if deliberately included in the seizure he was prepared to hold such seizure bad as 'inconsistent with the Crown's own contract'. The learned President had further seemed to regard the only possibility of termination of the contract by the Crown as arising under a

⁹ See Keir & Lawson, *Cases on Constitutional Law*, 3rd ed., at pp. 491-492.

¹⁰ [1944] P. 43.

term express or implied in the agreement.¹¹ As they stand the words are apparently an absolute denial of the doctrine of *The Amphitrite*. That doctrine was not however apparently raised in argument even though it was one which if valid must have settled the issue by invalidating the original contract of 1941.

The question of the scope of that doctrine was however expressly raised in *Robertson v. Ministry of Pensions*¹² where Denning J. (as he then was) distinguished *The Amphitrite* and suggested modifications to the principles there expressed in the light of subsequent decisions. The case before him arose out of the acceptance by the War Office of liability to pay a disability pension to an officer injured in the war, an acceptance which the Ministry of Pensions attempted to revoke, partly on the ground that it amounted to a fetter on the future executive action of the Crown. It is perhaps worth noting that in the case the phrase must have been intended to mean something other than a limit on the discretion of the Crown since the original acceptance was not a preliminary agreement regulating the future exercise of discretion, so much as being in itself an exercise once and for all. The learned judge distinguished the former case, firstly on the ground that the statement there, that the Crown cannot fetter its executive action, was unnecessary since the promise there in question was as Rowlatt J. said 'not one intended to be binding, but only an expression of intention'. With respect, however, it is suggested that the statement did in fact form part of the ratio being the grounds upon which Rowlatt J. excluded the undertaking from a class of contractual promises. The promise was one as to a course of conduct for which ample consideration could be found in the action of the Swedish shipowners in sending the ship to this country with the approved cargo. It was thus capable of being construed as contractual, but was reduced to an expression of intention solely because of this supposed inability of the Government to make the contract alleged. It suggested that this is apparent from the passage (at p. 503) where Rowlatt J. said: 'And that' (the undertaking) 'is to my mind not a contract for the breach of which damages can be sued for in a court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Government to fetter its future executive action . . .'. A passage which it is submitted shows that the final phrase quoted does contain the ratio and the explanation of the initial sentence. Even accepting the proposition as a rule of law Denning J. went on to state that the principle being based on the Crown Servant

¹¹ See p. 50: 'I do not think that a term that the Crown by unilateral action should be entitled to confiscate the subject matter of the contract can fairly be implied' (cf. Denning J., in *Robertson v. M. of Pensions*; post).

¹² [1948] 2 All E.R. 767.

cases must be modified in the light of *Reilly v. R.*¹³ and concluded that it could only be of limited scope, and could only apply where 'there is an implied term to that effect, or that is the true meaning of the contract'. Whether these are two distinct qualifications or alternative ways of stating the same proposition is not entirely clear but it seems that they are distinct. So far as an implied term is concerned it will be suggested that that again is not the true principle upon which the Crown Servant cases, which were again treated as illustrating the principle, are based. As to the 'true meaning' of the contract, if it be assumed to be a separate qualification, it may perhaps be regretted that a more certain criterion could not have been established to achieve that delimitation in scope of the general principle which is desired. It does, however, imply that there is no inherent inability of the Crown to bind itself absolutely, a proposition which is in conflict with that stated by Rowlatt J., but which Denning J. regarded as established by *Reilly's Case*.¹³ Since therefore the reasoning in both cases turns upon the analogy of cases involving the dismissal of Crown servants, it seems necessary before drawing any conclusion on the scope of *The Amphitrite* doctrine of freedom of executive action, to examine these cases in an attempt to find the basis upon which the power of dismissal by the Crown rests, and so, whether it rests upon a principle capable of application to Crown contracts generally.

In the earlier cases concerned with the grant of offices there are to be found rules limiting the grant for reasons connected with the type of office in question. Thus in *Sir George Reynell's Case*¹⁴ it was laid down that the office of the Marshal of Marshalsea could not be granted for years, being one concerned with 'the administration of justice and the life of the law' and hence not to be entrusted to a stranger, such as the executors or assignees of the grantee. The same principle was applied in *Mead v. Lenthall*,¹⁵ but at the same time such office could be granted in fee,¹⁶ when precisely the same objection could be raised. The illogic of the rule was demonstrated by Finch L.C. in *Progers v. Phrasien*.¹⁷ The reasoning is however interesting as showing some concept of public interest imposing limitations on such grants, such as that against granting judicial offices in reversion,¹⁸ since the grantee might be unfit at the time when the grant was to take effect or the rule that a grant to one who was unfit for the office was void. This element of public interest is most clearly stated by Coke when he lays down the last rule¹⁹ 'If offices either

¹³ [1934] A.C. 175.

¹⁴ 9 Co.Rep. 95a.

¹⁵ 1 Cro.Car. 587.

¹⁶ See *Comyns Digest*, Offices, B.7.

¹⁷ Shaw 171. See also *Jones v. Bird*, Hard. 49.

¹⁸ Bac. tit. Off. 11.

¹⁹ Co.Litt. 3b.

in the grant of king, or a subject which concerns the administration proceeding or execution of justice or the king's revenue or the commonwealth or the interest, benefit or safety of the subject or the like if they or any of them be granted to a man that is unexpert and hath no skill or science to exercise or execute the same the grant is merely void and the party disabled by law and incapable to take the same *pro commodo regis et populi* for only men of skill, knowledge and ability to exercise the same are capable of the same to serve the king and his people'. It is interesting though to see that the same reasoning is used in Bacon's Digest as an argument in favour of granting an office for life, on the assumption that the holder would, being sure of the position, take steps to ensure his proficiency. There was also recognised the right of the Crown to refuse the services of any officer, but according to *Slingsby's Case* (1680)²⁰ the suspension of Slingsby from the Mastership of the Mint did not operate to deprive him of the salary of that office though it did operate to deprive him of his fees. It is noticeable that the right to suspend was admitted not as a special prerogative but simply that otherwise it would be to 'deny the King that liberty which every subject hath to refuse the service of any man he does not like'. It was a right obviously essential having regard to the nature of an office, but it was by no means an absolute right of dismissal, a right necessarily involved where the appointment was during pleasure.²¹ Moreover the rights of the Crown were no more than those enjoyed in the case of grants by private individuals, and the conception of an office as a species of property necessarily involves the idea that a Crown grant is binding, and, assuming the initial validity of the grant, there is no suggestion to the contrary. It is true that such grants were to be construed favourably to the Crown²² and carried no more than was strictly warranted by them²³ but such a rule of construction is in itself an admission of the binding effect of a grant and would have been unnecessary without such effect.²⁴ As

²⁰ Reported 3 Swanst. 178. See also the discussion of these by Dr. Logan, *op. cit.*, in connection with salaries.

²¹ *Smyth v. Latham*, 9 Bing. 690.

²² See particularly *The Rebeckah* (1799) 1 C. Rob. 227, at p. 230.

²³ See, for example, *Taylor v. Att.-Gen.*, 8 Sim. 413, where despite the obvious reluctance of the Crown to allow that certain mines in Cape Breton were included in an earlier grant of mines in Nova Scotia (which had later been extended to cover Cape Breton) the question turned solely on the interpretation of the grant and its binding effect is assumed. And see *R. v. Larwood*, 1 Ld. Raym. 29, at p. 32: 'They agreed that it was not in the power of the King to take away liberties before granted by him' or Chitty, *Royal Prerogative*, p. 400: 'The grants of the King when valid in general bind him though without consideration as subjects are bound by their grants'. And see generally F. E. Farrer, 'A Prerogative Fallacy—"That the Crown is not bound by estoppel"', 49 L.Q.R. p. 511.

²⁴ Similarly the argument as to the effect of the words 'special grace certain knowledge and mere motion' in a grant loses significance unless the grant is binding.

late as 1869 in *Granville Murray v. Earl of Clarendon*²⁵ Lord Romilly could say, discussing an appointment in the foreign service, 'Unquestionably if he (the plaintiff) had been appointed to an office by Act of Parliament or by patent of the Crown, which was to be held so long as he behaved himself properly, then I might go into the facts of whether the removal of the gentleman was justified'. Although he found that the particular office was one held at pleasure, this readiness to review the circumstances of dismissal is opposed to any inherent inability of the Crown to provide for certainty of tenure. It is true that there has been a radical alteration in the outlook upon public service; the concept of an office as property, saleable within limits, no longer obtains and to that extent it may be said that all these cases are irrelevant. They retain however this significance, in that they show that at one time there was no inherent inability in the Crown to grant offices in the public service either in perpetuity or in appropriate cases for a term of years certain, subject to a possibility of forfeiture for abuse, refusal or non-user, or to suspension, and in *Reilly v. The King* (at p. 179) Lord Atkin regarded as immaterial the distinction between an office and other service.

The modern approach is shown in *Smyth v. Latham*.²⁶ The plaintiff had been appointed a paymaster of Exchequer bills under 48 Geo. 3, c. 1, under which 'the Commissioners of the Treasury shall and may from time to time appoint such person or persons as they think fit to be paymasters'; the statute contained no express power of dismissal. Tindal C.J., upholding Lord Tenterden, emphasised that the office not being an ancient common law one of which the duration and appointment was governed by ancient usage 'but an office of modern origin and not made the subject of legislative enactment until the statute before referred to, the question as to its duration and tenure is no other than an enquiry into the meaning and intention of the statute itself'. Since clearly the intent of the statute was in his view, not only to make the tenure of office independent of the tenure of the Commissioners of the Treasury, but also to enable the staff to correspond with the flow of business, he held that a power to dismiss at pleasure was necessarily implied, and that where such power was expressly inserted in a large number of similar statutes cited to him it was only inserted for greater caution. Such a basis for the rule of dismissability is both clear and understandable though the reasoning might involve uncertainty of tenure for those public servants employed in the majority of Government Departments which are created by a statute and which are discussed later,²⁷ but it will be shown that this result does not necessarily follow.

²⁵ (1869) L. R. 9 Eq. 11.

²⁶ 9 Bing. 690.

²⁷ See *post*, Part II of this Article (to be published at a later date).

Confusion seems to have entered partly as a result of an atmosphere of discretion brought about by the statutory precaution against the existence of any enforceable claim to such matters as pension²⁸ but principally as a result of cases concerning military officers.²⁹ In that connection it was laid down in *Macdonald v. Steele*³⁰ that 'His Majesty's pleasure supersedes all inquiry as he has absolute direction and command of the army'. Similarly in *Re Poe*³¹ a writ of prohibition to prevent the execution of a sentence of dismissal from the army imposed by a court martial was refused by Denman C.J. in part because of its futility since he recognised the existence in the Crown of a power of dismissal irrespective of the sentence. This refusal of the courts to interfere in matters of army discipline is well established and seems both reasonable and necessary, but it is justifiable on grounds quite inapplicable to members of the civil service.³²

By the end of the nineteenth century however, new arguments were being used and new justifications sought to support the rule which tended to obscure the distinction. In *Re Tuffnell*,³³ where the claimant alleged that he had been appointed surgeon of the Military Hospital, Dublin, for life, the argument was advanced for the Crown that under the Mutiny Act the prohibition of a standing army prevented the employment of anyone in the Army for longer than a year, an argument revived in *Leaman v. The King*³⁴ but which is not there dealt with in the judgments. Malins V.-C. in the former case although prepared on independent grounds to hold that the claim failed, chose instead to base his judgment disallowing the claim on the broad ground that 'it would be most injurious to the public service if the Crown had not the power, which we know it has, of saying to any naval or military officer misconducting himself . . . that the Crown has no longer occasion for his services'. That such a power was arbitrary he admitted but felt secure in relying on the benignity of the Government. Certainly something more than an argument based on the Mutiny Act was needed if the principle was to be extended to naval as well as land forces, and this he found in this inherent power of removal. The statutory authorisation of appointments

²⁸ See, for example, Superannuation Act, 1898, discussed subsequently. *Gould v. Stewart* as a result of which the Public Service Act, 1895, of New South Wales was passed to amend the Civil Service Act, 1884. As to this legislation see *Young v. Adams* [1898] A.C. 469. For a further illustration see s. 4 (3) of the Inland Revenue Regulation Act, 1890.

²⁹ For a parallel see Logan *op. cit.*

³⁰ Peake 233.

³¹ (1876) 3 Ch.D. 164.

³² The distinction between these two types of service is made apparent by consideration of the criteria which in such cases as *The Commonwealth v. Quince (post)* have led the court to the conclusion that there is no contractual basis for military service. The reasoning in such cases is, however, inapplicable to civil employment under the Crown.

³³ (1876) 3 Ch.D. 164.

³⁴ [1920] 3 K.B. 663.

was in his view limited only to those subject to the pleasure of the Crown. Furthermore, despite reference to misconduct in the passage quoted, the whole judgment showed that he was clearly of opinion that the power of removal was not thus conditioned. The petitioner here also advanced claims in respect of a civil appointment to a Regius Professorship in Dublin, but it was one so bound up with his military duties that the case can be of no authority in regard to the civil service under the Crown even though the judgment of the learned Vice-Chancellor did contain some loose references to the public service generally. In the following year in *Grant v. Secretary of State for India*³⁵ Grove J. asserted that the power was in the nature of Crown prerogative being for 'the public benefit, the safety of the realm, and possibly the existence of the Indian Empire'. In this case the plaintiff had been employed by the East India Company and subsequently by the Crown, when the latter took over the Company's forces, on the terms that his service was, under the Regulations, only conditional on health and that before removal he should have been acquainted with the reasons for it. This claim was bound to fail since Groves J. found (p. 459) that there was no contract with the company embodying the regulations which were in any event subject to alteration. The remainder of the judgment may therefore be dismissed as obiter, but it has interest since in the first place he held that this unlimited power of dismissal was not necessarily exclusive to the Crown—but was capable of being exercised by another body—the East India Company—exercising governmental functions, and secondly that because it was a power for the public benefit, it could not be contracted out of. This identification of other bodies exercising governmental functions with the Crown had already been suggested by Tindal C.J. in *Gibson v. East India Co.*³⁶ where, however, despite the equivalence he admitted the possibility of the Company binding itself absolutely by contract.

Both this element of public benefit and the suggestion of the extension of the power to other governmental bodies would make easier the extension of this doctrine of dismissibility to civil servants. Following these cases Lord Hobhouse in *Shenton v. Smith*,³⁷ a case of civil employment, in delivering the judgment of the Privy Council expressly disaffirming any reliance on prerogative where (at p. 235) he asserted 'Unless in special cases where it is otherwise provided servants of the Crown hold their office during the pleasure of the Crown not by virtue of any special prerogative of the Crown but because such are the terms of their engagement, as is well understood throughout the public service'. He appears therefore to base the right solely on an implied term and to admit

³⁵ (1877) 2 C.B. 445, at p. 453.

³⁶ (1839) 5 Bing. N.C. 262.

³⁷ [1895] A.C. 229.

the possibility of exclusion since that must necessarily follow where it would be in conflict with an express term. The case is disapproved by Robertson³⁸ on precisely these grounds arguing that the expression 'where it is otherwise provided' must be limited to statutory provision, but certainly that does not seem to have been the view of Lord Hobhouse since he referred (at p. 233) to the absence of any special contract, and clearly contemplated the possibility of the incorporation of the Colonial office regulations as the conditions of service though finding that they were not in fact incorporated. The case is of particular interest since it shows the unhesitating application of the rule, first applied to the military forces, to a civil member of the Crown's service.

This extension had already been suggested by Brett M.R. (as he then was) in *De Dohsé v. R.*³⁹ on the grounds that it was a general rule applicable to all public service under the Crown, though that case itself involved military service in the British German legion. The claim was based upon a supposed contract for seven years, but such a stipulation had it existed would in the unanimous opinion of the court (Baggallay M.R. and Bowen L.J.) have been contrary to public policy and hence could not have been validly made on behalf of the Crown. Their judgment was upheld in the House of Lords, primarily on the grounds of the absence of any such agreement, but Lord Halsbury and Lord Herschell agreed that a term for a seven years' engagement would have been contrary to public policy, a point on which Lord Blackburn expressly reserved his opinion. These statements on the effect of such a term must be treated as obiter having regard to the view taken of the facts. However, in *Dunn v. The Queen*⁴⁰ (a petition based upon civil employment in Africa) they are treated as binding statements of law and form the basis of the judgments in the Court of Appeal which included Lord Herschell (who had been a member of the Board in *Shenton v. Smith*). Kay L.J. and, to a lesser extent, the other members of the court, did however rely in part on the supposed lack of authority of Sir Claude MacDonald (who had engaged the petitioner) to enter into a contract for a period term on behalf of the Crown. The first argument of Kay L.J. that since Sir Claude MacDonald was himself employed at pleasure he could therefore have no authority to employ a subordinate for a fixed term, would, on the assumption that all Crown employment is at pleasure, effectively prevent any servant of the Crown entering into a binding long term agreement on its behalf, and would deny any effective power to a temporary civil servant. Moreover it is an argument which seems to lack logical validity and to be in conflict with general principles of agency. His conclusions

³⁸ *Op. cit.*, p. 358.

³⁹ Not reported until 1897, 66 L.J.Q.B. 422.

⁴⁰ [1896] 1 Q.B. 116.

must therefore rest on the general grounds on which he is in agreement with the other members of the court. Nevertheless even this argument of lack of authority itself rests partly upon the proposition that no Crown servant can have security of tenure since it implies that all employment in the service of the Crown being at pleasure, no authority to engage subordinates on any other basis can be given to one servant. The case is perhaps therefore a stronger one in favour of the existence of the general principle of dismissibility than is always allowed.⁴¹ Both Lord Esher and Lord Herschell were only prepared to recognise statutory authority for any limitation of this absolute power of dismissal, and for this Lord Esher again relied on *Shenton v. Smith* as an authority. It has already been suggested that a closer reading of the latter case does not bear this out, and moreover in the following year in *Dunn v. Macdonald*,⁴² arising out of the same transaction Charles J. stated 'My impression is that the Crown has power to engage a servant for a term certain and to delegate that power'. In the Court of Appeal Lord Esher again affirmed his earlier belief that no reference to a period term could be effective, and his reading of *Shenton v. Smith* is accepted explicitly by Avory J. in *Hale v. R.*⁴³ and implicitly by the Court of Appeal in that case.⁴⁴ Similarly the general proposition is accepted without hesitation in *Denning v. Secretary of State for India*.⁴⁵ It is moreover apparently assumed in *Gould v. Stuart*⁴⁶ (where in fact the terms of the statute did limit the right of the Crown to dismiss) that nothing less than a statute can have that effect since Sir Richard Crouch who delivered the judgment of the Privy Council refers (at p. 577) to the exceptional cases 'where it is otherwise provided by law'. A variant of this allegation of compelling public policy appears in relation to the recovery of salary in such cases as *Gibson v. East India Company*,⁴⁷ one of its bases being the prospect of the inconvenience arising from the multiplicity of suits which would result if officers were allowed to sue for their pay,⁴⁸ an argument which apparently assumes a readiness of the Crown to default on its obligations as a normal procedure and which would, of course, prevent any public contract being enforceable.

At the same time there is advanced in cases involving attempts to recover pay, particularly in *Mitchell v. The Queen*,⁴⁹ a new argument that 'all engagements between those in the military service of the Crown and the Crown are voluntary only on the part

⁴¹ See Dr. G. L. Williams, *op. cit.*, pp. 62, 63.

⁴² [1897] 1 Q.B. at p. 406.

⁴³ [1918] W.N. 102.

⁴⁴ [1918] W.N. p. 286.

⁴⁵ (1920) 37 T.L.R. 138.

⁴⁶ [1896] A.C. 575.

⁴⁷ 5 Bing.N.C. 262.

⁴⁸ *Ibid.*, at p. 275.

⁴⁹ [1896] 1 Q.B. p. 121, *per* Lord Esher M.R., at p. 122.

of the Crown and give no occasion for an action in respect of any alleged contract'. Again there is a connection between this argument and the cases in which the courts have refused to interfere with the decisions of courts-martial, or in any matter of military discipline.⁵⁰ Although the basis is inapplicable to civil servants, and in *Mitchell's Case*⁵¹ the proposition is expressly limited to military officers, it introduces a concept which is easily extended beyond its reasons to the Civil Service. Thus in *Kynaston v. Att.-Gen.*,⁵² although the case concerned an army officer claiming under the Royal Warrant governing army pay, Lord Hanworth M.R. (at p. 301) attempted to extend the principle to all Crown servants in respect of all claims arising from their employment.⁵³ His argument can, however, hardly be accepted on the basis which he advances, namely the changeability of pay codes since it is no uncommon thing for contracts to provide for automatic variations of their terms or to confer options to vary upon one party, and in the court below Farwell J. though maintaining the same proposition (the absence of any contractual relationship), was content to restrict it to military officers. The absence of any contractual liability of the Crown in relation to the army was again accepted by Acton J. in *Leaman v. The King*.⁵⁴ It is, however, typical of the confusion of argument in this matter, not merely that the Army Act refers to 'contract' but that when convenient the Crown appears ready to concede 'contractual relationship' even in the case of members of the armed forces. Thus in the argument in *Att.-Gen. v. Valle-Jones*,⁵⁵ the Solicitor-General (Sir Donald Somervell) treated the terms of the R.A.F. regulations as incorporated in the contract of service and based the right of dismissal on the terms of the contract thus composed. The question there was, however, one of recovery by the Crown against a third party and not by the servant against the Crown and an argument based upon public policy was used by the Crown to justify, if justification were needed, the refusal to discharge airmen injured in an accident for which the third party was responsible. That there can be a contract of some sort seems recognised by Lord Shaw in *Owners of S.S. Raphael v. Brady*⁵⁶ and Lord Loreburn in that case

⁵⁰ See, for example, *R. v. Sec. of State for War* [1891] 2 Q.B. 326. *Per* Lord Esher at p. 123: 'An officer cannot as between himself and the Crown take proceedings in the Courts of Law in respect of anything which has happened between him and the Crown in consequence of his being a soldier. The Courts of Law have nothing whatever to do with such a matter'.

⁵¹ [1896] 1 Q.B. 121.

⁵² (1933) 49 T.L.R. 300.

⁵³ 'The terms upon which a person in the civil and military services were employed were entirely apart from any form of contract which could only be altered by both parties'.

⁵⁴ [1920] 3 K.B. 663.

⁵⁵ [1935] 2 K.B. 209, at p. 212. Compare *The Commonwealth v. Quince* (1944) 68 C.L.R. 227 when a similar claim was rejected.

⁵⁶ [1911] A.C. 413, at p. 415.

summed up the authorities in saying that 'they go no further than to say that where there is an engagement between the Crown and a military or naval officer the Crown is always entitled to determine it at its pleasure and that no obligation contrary to that would be recognised as valid in law'.⁵⁷ These cases are all ones concerned with military service and there is no direct authority which suggests that the relationship of a civil servant to the Crown is not in some respects governed by some form of contract however uncertain its terms may be. This contractual basis is recognised in a case of 'casual' employment which stands as a curious exception to many of the authorities. In *The Queen v. Doutré*⁵⁸ a barrister of Quebec (and as such entitled to sue for his fees), was engaged by the Government of Canada, and in default of payment claimed the agreed fee by petition of right. Lord Watson delivering the judgment of the Privy Council held him entitled to sue upon a quantum meruit, the right to reasonable payment being 'implied condition of every contract of employment which is silent as to remuneration' (at p. 502). No question was raised in argument based upon the fact that this was a contract for services to be rendered to the Crown, too much therefore cannot be made of this case, but it is strange that the court should treat this contract on the normal basis of full liability to pay for services in the same manner as an ordinary citizen, while denying all such claims made by those entering the regular service of the Crown. Similarly in *Sutton v. Att.-Gen.*⁵⁹ where a Post Office telegraphist joined up in 1915 acting on a Post Office circular offering full civil pay in addition to military pay to those joining a particular branch of the army, he was held entitled by a majority of the House of Lords to recover by petition of right his basic civil pay and additional war bonuses, *i.e.*, precisely the things which had he remained in the Post Office service all the authorities would have denied him. The members of the House who dissented here did so on the grounds of construction of the particular contract. Again it seems strange that the Crown can contract to pay wages when it is not to receive the corresponding services, but cannot so contract where it is to receive those services. The principal difficulty in civil cases is not, it seems, the question of whether or not there is a contract of service, but whether various regulations are incorporated in it as terms and most frequently they are not.⁶⁰ Furthermore the regulations frequently go to considerable lengths to specify matters as granted as of grace and subject to discretion, terms which clearly prevent any possibility of enforcement by action, and since the matters thus dealt with are numerous

⁵⁷ *Ibid.*, at p. 414, and see Lord Halsbury in *Williams v. Howarth* [1905] A.C. at p. 554: 'The government in respect of this contract (the engagement of a volunteer in the South African War) is the King himself'.

⁵⁸ (1884) 9 App.Cas. 745.

⁵⁹ 39 T.L.R. 294. See also *Fisher v. Stewart* (1920) 36 T.L.R. 395.

⁶⁰ See *Rodwell v. Thomas*, *post*.

and important the effect has been to obscure the fact that not all matters are thus covered, but that some are the subject of an enforceable contract. The prevailing mist of discretion has been allowed to veil matters of right and to introduce unnecessary confusion into the discussion of the whole subject.⁶¹

In the principal modern case *Reilly v. The King*⁶² the Privy Council expressly rejected the idea, which had found favour with the Exchequer Court of Canada, that in no case of a public office can there be contractual relationship as to salary or term of employment on the one hand or duty to serve faithfully on the other.⁶³ The office there in question was one created by Statute (c. 62 of the Statutes of Canada, 1923) which provided for removal at any time for cause but subject thereto for appointment for a fixed time. The appellant was appointed for five years but within that period the office was abolished by statute without compensation. His claim based upon a breach of contract failed simply on the grounds that the contract was discharged by alteration of law and the discussion of the appellant's rights apart from this must therefore be obiter. Nevertheless the remarks of Lord Atkin on this topic have been treated, as in *Robertson v. Minister of Pensions (ante)*, as effecting a modification of the principle of dismissibility already discussed. In particular the passage at p. 179 where, rejecting the view of Orde J. in the Supreme Court of Canada, that every contract of service with the Crown must be subject to a term for dismissal at pleasure, he said, 'If the terms of appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is necessarily excluded'. This reference to the 'terms of appointment' may, however, only be to statutory terms. Lord Atkin's reference is precisely applicable to those in the case before him which were statutory, and the suggestion that it was

⁶¹ See, for example, *R. Vinkato Rao v. Sec. of State for India* [1927] A.C. 248 which seems, however, implicitly to admit the possibility of a contractual basis. For the denial of contractual relationships in relation to military service, see, e.g., *The Commonwealth v. Quince & Another* (1944) 68 C.L.R. 227, *M'Arthur v. The King* (1943) 3 D.L.R. p. 225, and in *America U.S. v. Grimley* (1890) 137 U.S. 147, at p. 152, and for the acceptance of some form of contractual basis in civil employment under the Crown see *Lucy v. The Commonwealth* (1923) 33 C.L.R. 225, particularly *Starke J.* at p. 253; *Carey v. The Commonwealth* (1921) 30 C.L.R. 132, and *R. v. Fisher* [1903] A.C. 158 (on appeal from Canada) particularly at p. 166.

⁶² [1934] A.C. 176.

⁶³ See also *Carey v. The Commonwealth* (1921) 30 C.L.R. 132, at p. 137, *per Higgins J.*: 'The relation between the Crown and its servants involves a contract'. And contrast *Rich J.* in *The Commonwealth v. Quince (supra)* at p. 241: 'The Crown's relation to the latter (i.e., ordinary servant as distinct from the holders of offices) is not that of master and servant, and they possess no rights against the Crown justiciable in courts of justice unless such rights have been conferred upon them by statute'. *MacTiernan J.*, *ibid.* p. 250: 'The engagement with which the injured airman entered upon his enlistment was not a contract. It was an engagement or promise on his part only'. But this is a case of military employment.

statutory terms with which he was dealing seems reinforced by his reference to *Gould v. Stuart* (*supra*) and to the appointment to judicial offices in both of which the limitation of the right to dismiss is statutory.⁶⁴ It does not seem therefore to follow without any doubt that the dictum was necessarily intended to cover cases where the limitation of the right to dismiss is found not in statute but in the contract itself, particularly since in a later passage Lord Atkin dealing with the allegation that there is in such appointment no contractual relationship emphasises that the power to determine at will is not inconsistent with the existence of a contract until so determined.

The case was unfortunately not discussed in *Rodwell v. Thomas*,⁶⁵ which is apparently the only relevant English authority subsequent to it, but one which can add nothing to the principles discussed since the claim for wrongful dismissal was based upon an allegation that the appropriate procedure for dismissal laid down in a Treasury circular had not been followed. That claim failed at the outset since Tucker J. found that the circular was not incorporated in the contract and even had it been there was no breach of its terms. The case, however, illustrates the difficulties of incorporating terms contained in various documents into such contracts. The learned judge, however, repeated the doctrine that the court will disregard any term providing for a fixed period of employment or mode of dismissal as being a clog upon the rights of the Crown, but his statement is obiter and was moreover, made without argument after an admission to that effect by counsel for the plaintiff.

The effect of *Reilly's Case* has been judicially considered in Canada in *Genois v. The King*⁶⁶ where the petitioner had been engaged as a seasonal fireman for a period of seven months but had been summarily dismissed within that period. Angers J. adopted the wider view of the effect of the dictum of Lord Atkin⁶⁷ *i.e.*, that it covers the exclusion of the absolute right to dismiss by the contract itself but then restricted it by apparently considering that the only limitation which could displace the general rule of dismissability was one providing for dismissal for cause. The absence of such a clause here despite the stipulation for a fixed term was therefore in his view fatal to the petitioner. With respect it is submitted that such an interpretation cannot be justified. The supposed rule is entire and if once it is admitted that the Crown can clog its power to dismiss there can be no magic in one particular form of clog rather than another; if cause can be effective so should a stipulation for a fixed period. The reference to

⁶⁴ This position seems to be impliedly accepted by O'Leary C.J. in *Campbell and Others v. Holmes* [1949] N.Z.L.R. p. 949.

⁶⁵ [1944] 1 K.B. 596.

⁶⁶ [1937] Ex.C.R. 176.

⁶⁷ The same view was taken by Williams J. in his dissenting judgment in *The Commonwealth v. Quince*, *supra*, at p. 233.

'cause' in Lord Atkin's judgment was dictated by the terms of the case before him and cannot limit the effect of the principle he enunciated if it is accepted in its broader sense.

All these cases have been set out at length in an attempt to determine the validity, and if valid, the basis of the supposed rule that the Crown cannot disable itself by contract from dismissing at pleasure. While it may be true that 'an established rule does not become questionable merely because different conjectural justifications of it have been offered, or because none is forthcoming that is not fanciful',⁶⁸ nevertheless a rule which requires so many, and sometimes contradictory supports deserves at least a careful examination before it is accepted, and to the extent that the rule broadly expressed runs beyond its reasoning, may rightly be treated as not binding. Certainly it can no longer be supported on the basis of royal prerogative. It seems that the older cases cited above afford no justification for it on that ground, and indeed it is questionable whether it can still be claimed that the appointment of civil servants is now by virtue of any prerogative power. It may well be, as Sir James Stephens argued in his comments upon the proposals for the reform of the Civil Service,⁶⁹ that this is the correct historical view of the origin of the service. It is also significant that the creation of the Civil Service Commission was by Order in Council rather than by statute, as have been major changes in the conditions of service,⁷⁰ but the Civil Service no longer consists of the Royal Household Staffs and steadily the movement has inevitably been away from that position, a tendency demonstrated by such statutes as the Demise of the Crown Act, 1901. More important however is the fact that the warrant for the existence of the greater part of the Departments of State is statutory. Such clauses as section 3 (2) of the Minister of Town and Country Planning Act, 1943, are by now nothing but common form.⁷¹ In all the departments thus created there seems, under the doctrine of *Att.-Gen. v. De Keyzers Royal Hotel*,⁷² to be no room for the operation of any prerogative in the appointment of staffs, and the power of dismissal is linked with the power of appointment.⁷³ There remain, however, some departments not thus

⁶⁸ *Per* Lord Sumner, *Admiralty Commissioners v. S.S. Volute* [1922] A.C. at p. 36.

⁶⁹ B.P.P. 1854-5, Vol. XX.

⁷⁰ See, for example, the lists of Orders in Council establishing and regulating the Civil Service listed in Heath, *The Treasury*, pp. 174 *et seq.*, and as to the segregation of the Civil Service from the Royal Staffs so far as payment and regulation of salaries, etc., was concerned, see *ibid.* 154 *et seq.*

⁷¹ 'The Minister may appoint such secretaries, officers and servants as he may with the consent of the Treasury determine, and there shall be paid to the secretaries, officers and servants so appointed such salaries or remuneration as the Treasury may determine.' ⁷² [1920] A.C. 508.

⁷³ See *Smyth v. Latham*, *supra*. It is true that the interpretation of a somewhat similar provision in that case might result in the introduction of an uncontrolled power of dismissal under a new form but it is thought that this does not necessarily follow. See *post*, Part II of this Article.

regulated, but even here it seems possible to maintain that the authority for employment for reward of all persons in these departments is to be found in the Appropriation Act.⁷⁴ This suggestion appears stronger when regard to the fullness of the estimate and the great detail of the actual notes laying down the maximum number of persons for the various departments and even of grades within the departments. It is true that a somewhat similar argument was advanced and rejected in *R. v. Tuffnell*⁷⁵ on the grounds that the authorisation of a standing army by statute merely allowed the engagement of troops under the old conditions of prerogative regulation. This case however is not necessarily authoritative in connection with civil employment since it was concerned with military service where, as has been indicated, very different reasoning applies to exclude any jurisdiction of the court. Again it should also be emphasised that, in any event so far as the Civil Service was concerned, appointment by virtue of the prerogative did not necessarily involve dismissability at pleasure. Furthermore even within those departments which do not owe their origin directly to statute it is found that many appointments are in fact now statutory creations⁷⁶ and it is apparent from the cases already cited that this supposed ability to dismiss at pleasure irrespective of the term of employment is not based by the court upon prerogative strictly so called. There remains then the basis of 'an implied term'. By itself this cannot afford any support for the main argument advanced by the Crown that no contract can ever give rise to a claim to employment for a fixed term or exclude in any way the possibility of arbitrary dismissal, since an express term to such effect must necessarily exclude the implied term if there is nothing more. The added element is then the allegation that any limitation of the right of dismissal is contrary to public policy and hence void, or as it has been phrased 'unconstitutional'.⁷⁷ Insofar as the latter phrase is an embodiment of the argument already discussed, *i.e.*, simply based on the connection of civil servants with the Crown, it is not, it is submitted, supported by authority since the older cases do not show any inability of the Crown like that contended for. The principal foundation must then be that the rule exists for the public benefit and cannot be limited because public policy requires it. On this basis there still remains a possibility of change

⁷⁴ While the Appropriation Act is not designed to affect substantive law, being financial rather than regulatory, nevertheless it is not without effect in substantive matters. Thus it is only in the Appropriation Act that the actual authorised strength of the Army is to be found enacted and provision therein may override other statutory limitations on expenditure. See *May*, 14th ed., at p. 713.

⁷⁵ [1876] 3 Ch.D. 164.

⁷⁶ See, for example, in relation to the Treasury, 56 Geo. 3, c. 98, s. 2, and 3 & 4 Will. 4, c. 13, s. 2.

⁷⁷ See *per* Lord Halsbury in *De Dohsé v. R.*, 66 L.J.Q.B. at p. 423.

in its expression and application. The concept of public policy is not immutable and can move with changed conditions, and even within a general head of policy, particular cases may fall outside it if the rule has been too widely expressed in its first exposition.⁷⁸ The supposed rule was laid down at its broadest by Lord Esher in *Dunn v. The Queen* and attempts to distinguish between various categories of servants seem only to have been made in *Leaman v. The King*, a case which, being concerned with military service, should not in any event govern civil employment under the Crown, and in *Hales v. The King*. It is true that in the latter Pickford L.J. expressly rejected the idea that because the petitioner was only a junior clerk in the Admiralty the general rule should not be applied to him. He did so however without apparently any consideration of the applicability of the basis of Lord Esher's dictum to the case before him. It is precisely this basis of public policy or interest which Lord Esher adopted which makes his statement of law too broad for modern application and should, it is submitted, have been considered in *Hales' Case*. In the first place as thus broadly stated the rule is in obvious conflict with the overriding principle of the sanctity of contract which it seems will not easily be displaced and which earlier Richards C.B. had suggested in *Att.-Gen. v. Lindegren*⁷⁹ (*post*) was even more important in relation to Government contracts than to private ones. Further there has been no examination in the cases of how far the public policy requires an unfettered right of dismissal as distinct from some lesser remedy. The justification advanced by Groves J. in *Grant v. Secretary of State for India*⁸⁰ that 'the safety of the realm and possibly the existence of the Indian Empire' depended on the existence of such a right, becomes simply absurd when applied to a junior official in a minor Department of State. It certainly will not justify all the conclusions suggested by Rowlatt J. in *The Amphitrite* e.g. that no enforceable term could be included in a civil servant's contract relating to leave (a matter which is however by the regulation in force kept clearly outside any claim of right). Hence it seems arguable that Lord Esher's statement does within itself contain a possible limitation upon its generality and that the ordinary remedies of a private employer such as those of transfer or refusal to employ the services offered are entirely sufficient in most cases to meet the requirements of the public interest which he advanced as the reason for his rule. Indeed this has been emphasised in recent times when the Government has normally regarded itself as adequately protected from the subversive activities of Crown servants by these remedies. Moreover it seems from his judgment in *De Dohsé v. R.* (at p. 422) that Lord Esher regarded the

⁷⁸ Cf. *Fender v. Mildmay* [1938] A.C. 1.

⁷⁹ 6 Price 287.

⁸⁰ (1877) 4 C.B. 445 at p. 453.

principle as applicable to the public service generally of which service under the Crown would (although at that time the most important) be one example and the principle would be equally applicable for example to local government offices.

On this basis recent applications of the public interest in other fields of public service are relevant. In particular many provisions of the Superannuation (Miscellaneous Provisions) Act, 1948, seem to show that the true public interest now regards as most important security and continuity of employment in view of the prevalence of superannuation schemes. Thus under section 6 of that Act the Minister of Health is empowered where, *inter alia*, he considers that a reduction of staff is necessary in the national interest, to declare a state of emergency as a result of which special machinery comes into operation for the preservation of accrued rights. These provisions are far distant from any concept of public interest requiring a right of instant dismissal in all cases, even where that interest is reinforced by an urgent need for national economy. It is, of course, true that the superannuation claims of local government officers with which the section is concerned are more readily enforceable than those of civil servants, but the latter seem, in practice, not to be very differently regarded.⁸¹ Indeed in general principle there is much to be said for the view expressed by Mr. Justice Brandeis in his dissenting judgment in *Myers v. U.S.*⁸² that the protection of the individual, even if he be an official, from the arbitrary or capricious misuse of power is an essential of free government.

The furthest limit of the rule if it is based upon public policy is that it can only be applicable where necessary for the protection of public safety. If this be so it follows as one consequence that the rule has hitherto been too widely expressed, and as another that the connection with such cases as *The Amphitrite* becomes more apparent, a consequence which perhaps enhances the probability that this is the true basis since the two matters on the authorities run together. It is possible that the general theory underlying these cases may well be similar to that which has found more precise expression in America in the doctrine of eminent domain in its application to contracts.⁸³ There seems to be some such idea

⁸¹ See, for example, Mr. Glenvil Hall, Financial Secretary to the Treasury, in the second reading of the Superannuation Bill, 1949, *Hansard*, vol. 462, col. 1200: 'Existing civil servants may contract out of it (the new scheme) if they so desire in view of the fact that it was not part of their contract when they entered the service'. Moreover, the two are brought closer together by the Superannuation (Transfers between Civil Service and Local Government) Rules, 1950 (SI 145) which seem, however, to endow pension rights with some of the qualities of a Cheshire cat since they are enforceable or not according to which service the officer belongs for the time being.

⁸² 272 U.S. p. 52 at p. 295. The case itself throws little light on the problems since although the majority affirmed the right of the President to dismiss at pleasure it turns upon the interpretation of the Constitution.

⁸³ See, for example, *West River Bridge Co. v. Dix*, Supreme Court of U.S. 6 Howard 507 *per* Daniel J. at p. 532. 'It cannot be justly disputed that in every politically sovereign community there enters necessarily the right and duty of

underlying the argument of the Solicitor-General in *Feather v. The Queen*⁸⁴ where he said 'even if the same rule of construction should prevail here as in grants between private individuals letters patent are void as being against public policy if they exclude or fetter the Crown as this patent would from using discoveries relating to matters necessary for the defence of the realm'. This argument has, of course, in that connection received statutory sanction in the Statute of Monopolies.⁸⁵ It is the same argument of defence requirements based on military needs which was apparently advanced for the Crown in *The Amphitrite*. When regard is had to the facts of that case (involving as they did the regulation of shipping and the denial of shipping to the enemy, both matters vital in war), it seems likely that it was some such consideration on which Rowlatt J. relied when he said 'It (the Government) cannot by contract hamper its freedom of action in matters which concerned the welfare of the State' and similar consideration would also give some grounds for his attempted distinction between the argument before him and the cases of 'commercial' contracts. On this basis, which it is thought is neither an unreasonable limitation nor distortion of the judgment, the decision is not so objectionable as it appears to be at first sight, though without any greater precision in this concept of public welfare, the alleviation may be slight. Even so, the emphasis on public safety is a considerable limitation of a principle which was on its face widely expressed, but which must it is thought be narrowly confined, both on grounds of principle and convenience⁸⁶ if government contractors are to have any confidence in their dealings. It was precisely this point which was emphasised by Richards C.B. in

guarding its own existence and protecting and promoting the interest and welfare of the community at large, not merely in the highest acts of sovereignty and in external acts—relations of governments—they reach and comprehend likewise the interior polity and social life which should be regulated with reference to the advantage of the whole society. The power denominated the eminent domain of the state is, as its name imports, paramount to all private rights vested under the government and these last are by necessary implication held in subordination to this power and must yield in every instance to its proper exercise'. See also *Pennsylvania Hospital v. Pennsylvania* [1917] 245 U.S. 20 where White C.J., holding that the effect of the 'contract clause' of the constitution is subject to the right of the Government to 'legislate for the preservation of society and to secure the performance of essential government duties'. This power was, however, held to be only exercisable subject to compensation.

⁸⁴ (1865) 6 B. & S. 257.

⁸⁵ 21 Jac. 1, c. 3, and see *The Case of Monopolies* and s. 46, Patents Act, 1949, and s. 1 (1) (a) of the Development of Inventions Act, 1948.

⁸⁶ An invocation of the broad principle of *The Amphitrite* in *R. v. International Trustee for Bondholders* [1937] A.C. 500 would not merely, it seems, have rendered unnecessary the arguments of private international law developed there but would have effectively cut out the possibility of raising such loans abroad in the future. And compare Williston, *War Contract Claims*, § 116: 'Generally any contract may be terminated by the government for its convenience if it exercises its right to such termination or cancellation in a non-arbitrary or capricious manner and in strict accord with the cancellation provisions contained therein'.

*Att.-Gen. v. Lindegren*⁸⁷ to which reference has already been made. There an attempt was made to challenge a contract entered into by the defendant with the Navy Board for the purchase by him of stores on behalf of the Navy in Riga during the Napoleonic wars. In refusing to re-open the transaction the Chief Baron said (at p. 304) 'Undoubtedly on principles of public policy it would not be right to disturb contracts made with persons in the situation of the defendant. Public confidence in the dealing of the government with persons in the character of the defendant is of the first importance and should be regarded above all other considerations and that confidence ought not to be shaken as a result of any subsequent calculation and inquiry by the commissioners of a public board showing that their contract has been injurious to the public merely on the grounds of too great liberality in remunerating the service required and performed'. Earlier he had rejected with equal firmness the idea that mere imprudence on the part of the Board would entitle them to repudiate the contract. It is also noticeable that in *Thomas v. The Queen*,⁸⁸ although a case involving military equipment, Blackburn J. does not suggest any inherent limitation on the Crown's capacity in contract and indeed the cases on which he relied, in particular the *Banker's Case*,⁸⁹ would suggest precisely the opposite. In the latter case the wording of the grant had been carefully phrased in order to secure that it should be binding on the Crown,⁹⁰ and Holt C.J. in Skinner's report⁹¹ deliberately rejected any idea of the inalienability of the revenue on the grounds that to have held otherwise would have been to deny to the Crown the capacity enjoyed by a subject.

It is therefore submitted that the wide expressions used in *The Amphitrite* are not justified but that within the narrower limits suggested the principle of that case is reasonable and finds support in older authorities. It is not suggested that these limits can as yet be precisely defined but clearly they are not limited to the military protection of the state; it is thought that they include other matters where the contract would prevent the state fulfilling its essential functions.

It is, however, noticeable that at a period when the decision in *Thomas v. The Queen*⁹² was still regarded as uncertain (and hence limits to the availability of a petition of right for breach of contract might well be sought) there is still found no trace of this doctrine of an inalienable freedom of executive action even in cases which are outside the category which would normally be regarded as commercial. Thus, for example, in *Windsor and Annapolis Railway Co.*

⁸⁷ (1819) 6 Price 287.

⁸⁸ (1874) L.R. 10 Q.B. 31.

⁸⁹ 14 State Trials, p. 1.

⁹⁰ See, for example, the wording of the grant at 14 State Trials, p. 14.

⁹¹ See particularly, p. 602.

⁹² (1874) L.R. 10 Q.B. 31.

v. *The Queen*,⁹³ the dispute arose out of the attempted revocation by the Crown of a 'running' agreement for a term of 21 years over certain railway tracks in Canada. Despite the fact that the case arose out of a reorganisation of the railway system in a developing community, a matter in which government discretionary powers might well have been considered to be involved, Lord Watson delivering the judgment of the Privy Council bluntly affirmed (at p. 613) that 'wherever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from the breach of the contract'. It is true that it may be argued that the word 'valid' begs the whole question but that argument seems to be reading too much into the judgment. In the absence of further authority there is, however, little to be gained by further discussion of the exact limits of the doctrine beyond the suggestion that it is confined to matters fundamental to the existence and proper government of the community, a suggestion which seems justified by the cases quoted above and which in itself severely cuts down the possible sphere of operation, provided, of course, that the courts do not abdicate all jurisdiction to decide when a matter is thus fundamental.⁹⁴ The consequences of its operation will fall to be discussed later but here it may be said that it is doubtful whether it necessarily follows that no damages are recoverable for the termination of contract by the Crown even within the suggested limits of the doctrine.

On such a basis it is clear that there would have been no possible room for the application of *The Amphitrite* rule in *Robertson's Case* and with respect it is submitted that the other grounds upon which Denning J. attempted in the latter case to distinguish the former are unsatisfactory. The argument based upon *Reilly's Case*⁹⁵ depends upon the effect of that case upon the earlier authorities, and as has been suggested above an examination of Lord Atkin's judgment does not necessarily bear out the interpretation placed upon it. Nor, it is submitted, is an 'implied term' the proper basis of the supposed doctrine of *The Amphitrite* since that alone is not capable of justifying the rule as it has been stated.

J. D. B. MITCHELL.*

(To be continued.)

⁹³ (1886) 11 App.Cas. 607.

⁹⁴ On similar reasoning to that of such cases as *Liversidge v. Anderson* [1942] A.C. 206. The parallel does not, however, seem exact.

⁹⁵ [1948] 2 All E.R. 767.

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EPILOGUE TO EPITHALAMIUM

(Further comments on *Lennie v. Lennie* 1948 S.C. 466; 1950 S.C.(H.L.) 1; [1949] 65 T.L.R. 763)

IN concluding his article 'Epithalamium—A Scottish Trilogy', 12 M.L.R. 162, the present writer observed: 'The decision of the House of Lords in *Lennie*, if the appeal be taken there, will be awaited with anxiety and interest'. 'Anxiety' has proved to be indeed the appropriate word. It was envisaged (p. 166) that, if the appeal were taken (apart from the question of sufficiency of proof in the actual case *sub judice*), two major issues might be before the House of Lords for determination, viz. :—

- (a) May refusal by one spouse of sexual intercourse against the wishes of the other constitute desertion under the Divorce (Scotland) Act, 1938?
- (b) Is it permissible in a Scottish action for divorce on these grounds 'to discover or reveal the intimacies of the marriage bed'?

In the event, the House of Lords decided in *Lennie v. Lennie* 1950 S.C.(H.L.) 1 that malicious refusal of intercourse *per se* no longer constitutes desertion according to the law of Scotland. Had it been necessary to decide the second point, it seems that the pursuer would also have failed thereon.

Since it was accepted beyond peradventure by the legal profession in Scotland that malicious refusal of sexual intercourse *per se* was desertion under the rule of *Goold v. Goold* 1927 S.C. 177, and since it was accepted by the majority of the House of Lords in *Wilkinson v. Wilkinson* 1943 S.C. (H.L.) 61 that 'desertion' under the 1938 Act was to be construed in the light of previous practice, it was not surprising that Guest K.C. for the appellant in *Lennie*, based his appeal on the questions of acquiescence and of sufficiency of proof, and not upon the substantive ground. The whole Second Division had recognised the continued validity of the rule in *Goold* even after the 1938 Act. In *Weatherley v. Weatherley* [1947] A.C. 628, moreover, both the Lord Chancellor and Lord Normand had gone out of their way to give express warning that their decision was on the English law of desertion, and that the citation of Scottish decisions on divorce or *vice versa* could seldom be profitable. These comments could scarcely have prepared counsel for the appellants for the attitude adopted by the House when *Lennie* came before it for hearing in July, 1949. Whereas the appeal was taken upon the contention that the pursuer had proved her case, and the *jus actionis* was assumed, it was rejected upon the ground that she

had no *jus actionis*. There has been considerable surprise among practitioners in Scotland as to this unpredictable attitude of their Lordships' House.

One general point may be made on *Lennie*. The Courts of Scotland have felt perfectly capable of exercising consistorial jurisdiction without the assistance of a King's Proctor. It is true that in a case of collusion, for example, the Lord Advocate might appear, but this has been an extremely rare occurrence. Accordingly, generally speaking, in undefended divorce cases there is no contradictor. This causes no difficulty in the Court of Session, since the entire College of Justice participates directly in the hearing of divorce actions; even the Lord President and the Lord Justice-Clerk sit alone in the Outer House from time to time to take such cases. Accordingly, all the judges are perfectly *au fait* with the *usus fori* in such matters. If a case of unusual difficulty arises, it may be sent for hearing by a Full Bench. The House of Lords does not have this advantage, and, indeed, has admitted its difficulty. Thus, when an appeal was taken to the House of Lords in the undefended divorce action of *Bell v. Bell* 1941 S.C. (H.L.) 5, their Lordships asked the Lord Advocate (now Lord President Cooper) to assist at the hearing by the citation of such authorities and the raising of such arguments as he might consider to be relevant. One may well conjecture from the Lord Chancellor's remarks (p. 8) that the Lord Advocate feared that this request was an innovation which might well lead to yet another assimilation of Scottish practice to that of England. Accordingly, he pointedly refrained from attending in person, but arranged as a matter of grace that the Solicitor-General for Scotland should appear and address the court. Lord Simon, adverting to the Solicitor-General's appearance, remarked that 'in a matter which would determine for the future the law of Scotland on a question of wide application in which the public interest is concerned, the House should not reach its conclusion, in an appeal where the respondent did not appear, without the most complete assurance that all relevant considerations were orally placed before it'.

Bell, however, has not established a precedent, and in *Lennie*, if one may say so without disrespect, their Lordships acted as contradictors in a somewhat disconcerting fashion. This was especially unfortunate since the Lords who heard the appeal were not in touch with the daily practice of the Court of Session. Three of their Lordships had already expressed views in the English case of *Weatherley v. Weatherley*, where the *species facti* were the same. Further, the majority of the House were versed only in the English tradition, and were, consequently, unusually reliant on the Scottish minority and upon a dictum of Lord President Cooper in *Burrell v. Burrell* 1947 S.C. 569—a dictum which, it is respectfully submitted, was construed to carry much more meaning than the Lord President intended.

One could wish that provision were made in important Scottish appeals for the reinforcement of the House of Lords with experienced judges of the Court of Session—say by the Lord President and/or the Lord Justice-Clerk. It was somewhat remarkable that Lord Merriman, President of the Probate, Divorce and Admiralty Division of the English High Court of Justice, should have taken so active a part in the *Lennie* appeal, while the Lord President of the Court of Session should not have been privileged to attend. Certainly, one would not recommend an arrangement which would compel the Lord President or the Lord Justice-Clerk to travel continuously to London; this would disorganise the business of the Court of Session. One might suggest incidentally that, since the Appellate Committee of the House of Lords now sits as a Committee, there would seem to be no good reason why it should not sit in Edinburgh, reinforced by the leading judges of the Court of Session, to hear Scottish appeals.¹ It is probable that the bringing of the Supreme Court of Appeal to Scotland to hear Scottish appeals would further emphasise the fact upon their Lordships that they sit as a Scottish Court of Appeal. While on the topic, one might observe, though *obiter* so far as *Lennie* is concerned, that, except in cases concerned with the specialties of feudal conveyancing, which are usually left in the hands of the Scottish Law Lords, there is a tendency for the English judges, in appeals to the House of Lords, to think and express themselves in English terms of art. Moreover, a hearing in Edinburgh would presumably reduce the expense of Scottish appeals; discourage the undesirable practice of retaining English counsel in such appeals; and relieve counsel (who as a rule are unfamiliar with English law) of the burden of establishing *in limine* that the law of Scotland does not coincide with that of England upon the point *sub judice*.

In *Lennie* itself, it must be conceded at once, the leading opinions were delivered by the two Scottish Law Lords, supplemented by a shorter judgment of Lord Merriman. In fact, however, a more active part than the report discloses was taken by the English judges at the actual hearing. In any event, all the judges seemed to be unaware that decrees of divorce for malicious refusal of sexual relations were a commonplace in the Court of Session. A *usus fori* in the Outer House had undoubtedly been established, and it is now set aside. This lack of contact with the daily practice of the Court of Session became very material when Guest K.C. was pressed for authority that the rule in *Goold* was in fact applied in Scotland. As the writer commented in "Epithalamium", this

¹ If it is suggested that it is a peculiar benefit to Scots law that it is under the ultimate scrutiny of a majority of English judges, the logical corollary might be urged that English law should be subjected to a final consideration by a majority of Scottish judges in Edinburgh. The current tendency of the Dominions to abjure similar advantage of review of their decisions by a predominantly English-trained Board in the Privy Council, suggests that the geese are unimpressed by their unilateral privilege of sauce.

rule has been so unquestioned since *Goold* that cases on the point, with the exception of *Macdonald* 1948 S.L.T. 380 (which raised a specialty), have not been thought worth reporting. This fact and the dictum of Lord President Cooper to be discussed presently proved fatal to the pursuer's case.

Lord Cooper had said in *Burrell v. Burrell* at p. 576: 'In *Goold v. Goold* it was held that malicious denial of carnal intercourse persisted in for four years may constitute desertion within the meaning of the Act 1573, c. 55, but that the standard of proof both of the denial itself, and of the absence of consent by the offended spouse, must be exacting. I have had difficulty in appreciating certain of the implications of this recent innovation upon our law, and in reconciling them with the essentials of desertion. But it is unnecessary to examine the matter narrowly, since, even accepting the rule in *Goold v. Goold* at its face value as applicable to the post-1938 law of divorce,² I am clearly of opinion that this action fails'. The Lord President's dictum was, in any event, *obiter*, but has all the weight of his personal authority. It may be observed, however:—

- (1) Though he considered the rule in *Goold* to be an innovation, he did not question the validity, since 1927 at least, of that rule as a construction upon the Act of 1573.³ (The rule in *Goold* was not the only instance of judicial interpretation of the strict wording of the original Act.)
- (2) He did not exclude the possibility that the 1938 Act might have effected some change in the law.

Lord Russell concurred; Lord Carmont accepted the rule in *Goold* as still being the law of Scotland, as did Lord Keith. *Burrell* was, moreover, accepted by Lord Sorn and by the Second Division in *Lennie* and by Lord Mackintosh in *Macdonald* as authority for the continued operation of the rule. It seems reasonable to suggest that if the appellant had gone to a Court of Seven Judges or to a Full Bench of the Court of Session, as Lord Mackay at one juncture had in mind, the rule in *Goold* would still be good law in Scotland. The House of Lords, however, invoked the Lord President's dictum, not to question the applicability of the rule in *Goold* to the post-1938 law of desertion, which might have seemed the expected line of attack especially in view of the careful phrasing of the dictum in question, but to demonstrate that there *never had been* any such valid rule in fact. It is this approach which has probably created most astonishment in the Court of Session. The House of Lords specifically reaffirmed that the conception of desertion built up by judicial interpretation of the Act of 1573 still

² Writer's italics. The first reason in the appellant's printed case seems framed to meet the possible suggestion that the 1938 Act might have changed the law.

³ It is not suggested that he viewed it with any particular favour.

applies after the 1938 Act. It should follow that, as they legislated upon desertion but did not find it necessary to repudiate the rule in *Goold*, the framers of the 1938 Act were satisfied with the law as it stood on this point prior to the Act.⁴ Their Lordships, indeed, accepted this view—but proceeded somewhat surprisingly to change the previous law *ex post facto*, and then demonstrate that no change had been made by the Act. Lord Normand said (p. 26): ‘But the Divorce (Scotland) Act, 1938, did not fix the legal meaning of desertion either by a new statutory definition or by reference to existing decisions. It was not indeed concerned with the legal content of the conception of desertion and it employed the word only as a descriptive term of common usage. The Act is therefore no hindrance to overruling of decisions upon what constitutes desertion which on later and fuller consideration appear to be erroneous’. Lord Merriman and Lord Reid also specifically overruled *Goold*. Their reason seems to be that they doubted whether this case had been regarded as settling the law in Scotland.

When Lord Cooper refers to ‘an innovation’ in our law, it must be recalled that ‘*unus homo sustinet plures personas*’. He is one of the few legal historians in Scotland, being noted in particular as the learned translator of and commentator upon the ‘*Regiam Majestatem*’. He has the historical sense, and when he referred to ‘an innovation’ we may note that the ‘innovation’ to which he referred is at least somewhat senior to the ‘innovation’ in *Donoghue v. Stevenson* [1932] A.C. 562; 1932 S.C. (H.L.) 31. For this reason the careful examination, upon which Lords Normand and Reid embarked, of the authorities from MacKenzie to Fraser, does not really seem to assist in reaching a decision as to whether, by judicial construction, refusal of sexual intercourse *per se* constituted desertion in the law of Scotland from 1927 to 1947. Surely twenty years is a long enough time to establish a *usus fori* which is entitled to respect by the House of Lords? This is, of course, the minimum period. There are weaker authorities going as far back as MacKenzie (1686) which can be invoked to support the doctrine. It is respectfully submitted, that, if the House of Lords wished to rely upon Lord Cooper’s dictum, they should have directed their investigations to a construction of the Divorce (Scotland) Act, 1938, and to the observations of their own House in *Bell v. Bell* 1941 S.C. (H.L.) 5, and *Wilkinson v. Wilkinson* 1943 S.C. (H.L.) 61.

Lord Cooper’s dictum might not have weighed so heavily with the House of Lords if counsel for the appellant could have

⁴ Since this article was written an admirable note on *Lennie* by Professor Sir Percy Winfield has appeared in 66 L.Q.R. 147. The present writer welcomes such eminent support for his view that the Legislature in framing the Divorce (Scotland) Act, 1938, must be held to have intended the word ‘desertion’ to bear the meaning given to it in *Goold*. The position is indeed stronger than Sir Percy supposed, because of the practice in the Outer House. If this view is sound, then Lord Normand’s scholarly analysis of the earlier authorities was not really relevant, and loses its force.

established that the rule in *Goold* was so generally accepted by the Scottish courts that to overrule it would disturb without good reason a settled practice. Unfortunately, as has been observed, the rule was so much settled practice that there was no occasion for the law reporters to record the numerous cases in which it was applied. These cases were within the judicial knowledge of most of the Senators of the College of Justice, and were part of the experience of those who practised before them. No such knowledge could, in the nature of things, be expected of the majority at least of the Lords of Appeal in Ordinary. As a result, Guest K.C. was only able to refer them to *Macdonald*—which seems, incidentally, to have survived the appeal in *Lennie* as a maintainable authority still.

The question of burden of proof was dealt with as a subsidiary part of Lord Normand's and Lord Reid's opinions. Lord Reid went so far as to say (p. 29) that 'In a case where there was no overt separation, this burden of proof would be so great as to be almost impossible to discharge, and the law would be left in the very unsatisfactory position of affording a remedy in theory which it denied in practice'. Lord Reid seems to have overlooked that in *Macdonald*, the circumstances did make it possible to discharge the exacting burden of proof necessary to establish refusal of intercourse. Moreover, the different approach to the same question of the Lord Justice-Clerk (Thomson) at an earlier stage in *Lennie* may be recalled: 'I do not think that it would be creditable to the law if, after saying that the remedy was available, and the evidence was competent, it went on to say that the burden of proof was so heavy as to be virtually impossible of discharge'. In any event, in actions for decree of nullity or where a defence of condonation is raised, the courts do seem able to surmount the difficulties.

Their Lordships, as contradictors, also pressed counsel for the appellant as to how much refusal of intercourse constituted desertion. What, it was asked, would be the position if connection were permitted on rare and exceptional occasions? Lord Normand said on this point: 'Mr. Guest's position was that a single act of connection in the period of three years of desertion founded on would destroy the right of action. I think that no other answer would have been consistent with the requirement that desertion must have been obstinately persisted in for three years continuously. But it seems to me that this is the *reductio ad absurdum* of the proposition contended for'. His Lordship's conclusion of absurdity may not be shared by everyone. Where statute prescribes a three-year period it is admittedly an arbitrary rule; but there must be *some* fixed period. If a pursuer's case rested upon desertion of the ordinary kind for one day short of the triennium would it be a *reductio ad absurdum* to refuse him decree? Or, again, if the parties resumed full cohabitation for a short period in the midst of the triennium of

desertion, would it be *reductio ad absurdum* to refuse decree until three years had run from the separation of the spouses after such cohabitation?

Their Lordships reserved their opinion upon the point whether it would follow from the dismissal of the appeal that the appellant wife's withdrawal from cohabitation, because she found the conditions imposed during the triennium to be intolerable, *ipso facto* constituted her the deserting spouse. One can only hope that the more charitable conjecture is justified.

Speculation may be unwise as to how Scots law will now deal with the *species facti* of *Goold*, *Burrell* and *Lennie*. *Macdonald* possibly remains, it seems, good law in cases where cohabitation at bed and board have both ceased, though the parties live under the same roof. *Wanbon v. Wanbon* [1946] 2 All E.R. 366 might be regarded as the English equivalent; but this decision was severely criticised in *Hopes v. Hopes* [1948] 2 All E. R. 920.

It may be said that the current tendency of the English judges (especially those who are directly in contact with the parties) is to restrict the application of the decision in *Weatherley v. Weatherley*. A somewhat similar tendency was apparent after the House of Lords decision in *Russell v. Russell* [1924] A.C. 687. It appears that refusal of intercourse is being considered principally as an element in constructive desertion, e.g., *Lawrance v. Lawrance* [1949] W.N. 425, or of cruelty, e.g., *Walsham v. Walsham* [1949] P. 350, though in neither case, apparently, has such refusal *per se* been sufficient in itself. Despite the case of *Gow v. Gow* 1877 14 R. 443, it may be said that the doctrine of 'constructive desertion' has not taken root in Scotland; and possibly also a more robust approach to the question of cruelty is apparent in the Court of Session than in the Probate, Divorce and Admiralty Division.⁵ It does seem reasonable, however, to expect that malicious refusal of intercourse will be considered as an element in an action based on cruelty. The devils expelled through the door will return through the window. As soon as this is conceded, it becomes apparent that all the questions of competency and weight of evidence which were discussed by the Second Division in *Lennie* again become matters of importance. It seems that the House of Lords took a much narrower view than did the Second Division on these points, but did not specifically disapprove the reasoning of the

⁵ It has very recently been affirmed by the Second Division in *Dunlop v. Dunlop* 1950 S.L.T. 168 that on a true construction of s. 1 (1) (c) of the Divorce (Scotland) Act, 1938 there is no 'vested right' to divorce on grounds of cruelty. Thus the court must always consider at the hearing of the action whether the pursuer would be in safety to resume cohabitation with the defender. The opposite conclusion was reached in England on different statutory language in *Meacher v. Meacher* [1946] P. 216. It will be interesting to observe whether, following the decision in *Dunlop*, the law of Scotland will develop a doctrine of 'constructive desertion'. In desertion the pursuer takes a 'vested right' after the triennium.

Scottish judges. Provided that no precipitate appeal is taken to the House of Lords, it should continue possible to cite the dicta of the Lord Justice-Clerk and Lord Mackay upon the point of competency of evidence of the spouses even when they share the same sleeping accommodation.

The present state of the law is not satisfactory. In other jurisdictions the effect of the rule in *Goold* was achieved by legislation; the same might well have been true in Scotland had not the result been achieved by judicial legislation, since the Legislature presumably had this in mind in 1938. Possibly the Legislature will one day find time to deal with this question specifically, but the writer is not sanguine.

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STATUTES

REPRESENTATION OF THE PEOPLE ACT, 1949

THIS is a consolidating measure. Part I deals with Parliamentary and Local Government Franchise; Part II with the Election Campaign (election agent, election expenses, propaganda, meetings, conveyance of voters to and from the poll and various illegal practices); Part III with Legal Proceedings (including election petitions and prosecutions for corrupt and illegal practices); Part IV with certain special provisions as to certain local elections; Part V with interpretation and application. The Schedules include detailed rules for the conduct of parliamentary and local elections and various other matters.

The most important changes are those which were contained in the 1948 Act of the same name. These include the abolition of the business premises and university votes, the increase in the number of polling stations, the extension of polling hours, the decision of tied votes by lot instead of the returning officer's casting vote, the restriction on election expenses and on the use of motor vehicles for taking voters to and from the poll. The Act provided that registers were to be compiled twice in each year but, as an economy measure, this has been reduced to once in each year.

The 1949 Act has the great advantage of drawing together in one statute almost all the provisions relating to representation and to elections. Some of its provisions were the subject of severe criticism when they were before Parliament in the 1948 Bill. Disagreement particularly centred around the abolition of plural voting and the use of motor-cars. The Opposition saw this part of the Bill as the sharp and not over-thin edge of totalitarianism; or, alternatively, in the words of their leader as a 'small, minor, pinching piece of chicanery'. The Government looked on them as fair measures designed to establish the principle of 'one man, one vote', 'one vote, one value', and equality of opportunity in the physical transportation of the hand which made the cross. Subjective emotions on both sides paraded rather self-consciously as objective rationalisations.

Recent events have put its parliamentary proceedings to the test. On the whole, it has passed with colours at half-mast. We are not suggesting that the equality of opportunity in the Act was the cause of the equality in result. The half-mast reflects both mourning and indecision since, although the conduct of the recent election was no doubt as satisfactory as any in this century, certain parts of the Act which were supposed to be half-shut gates

became merely gaps in the hedges through which four-horsed coaches and, particularly, pony traps were driven with the greatest facility.

Section 88 of the 1949 Act provides that, subject to certain provisions, a person who with a view to supporting or opposing the candidature of any individual as against any other or others at a parliamentary election, either lets, lends or employs, or hires, borrows or uses, any motor vehicle for the purpose of the conveyance of electors to or from the poll, is guilty of an illegal practice. A candidate is not liable for the acts of such a person and his election is not avoided unless he or his agent consented or connived. Sub-section (3) provides that nothing in this section shall (a) prevent any person employing a motor vehicle for the purpose of conveying to or from the poll himself or any member of the same household, or borrowing a motor vehicle from a member of the same household to be employed for that purpose or (b) prevent a candidate at an election or some person on his behalf employing a motor vehicle for the purpose of conveying any person to or from the poll, if certain conditions are fulfilled. These conditions are detailed in sub-section (4). They require the motor vehicle to be registered and to carry a placard indicating that it is so registered; the number of registered motor vehicles to be used for any candidature is limited. 'Motor vehicle' is defined to mean any mechanically propelled vehicle constructed or adapted for use on roads. 'Member of the same household' is defined to include overnight visitors and domestic servants. Sections 89 and 90 exclude the use of public stage or hackney carriages and any carriage kept or used for the purpose of letting out for hiring, whether mechanically propelled or drawn by animals. There are many difficulties in these sections. First, the phrase 'with a view to supporting or opposing the candidature of any individual', in the opinion of the Home Secretary on the Report Stage of 1948 Act, does not preclude the giving of lifts to neighbours or friends if it is not part of an organised campaign. If the vehicle carries placards or colours a rebuttable presumption is raised by the Act that the vehicle is being used 'with a view', etc. Second, the election of the candidate is not jeopardised if the illegal practice is committed without the consent or connivance of the candidate or his agent. Such a provision is perhaps unavoidable. The risk of detection on a dark night is not great and, taken with the doubt concerning 'lifts', proof becomes very difficult. Third, the emergence of pony traps, carts, sedan chairs and other forms of conveyances which are not mechanically propelled while adding in many rural areas a touch of the picturesque also whittled down the effect of the section. Fourth, section 88 (3) (a) does not provide, as presumably was meant, that the person conveying himself and his household to the poll should do so in his own car and not in that of a person of

another household. Fifth, and most important, the restriction on the use of motor vehicles is 'for the purpose of the conveyance of electors to or from the poll'. It was not altogether unknown in the recent election for fleets of unregistered cars to convey voters from their homes to places near the poll. A car which stops short of the poll by a few hundred yards may well be caught by the section. But where voters are deposited at committee rooms strategically sited near the poll, the Act would seem to be evaded without illegality.

The other section of the 1949 Act which caused some difficulties of interpretation was section 63 (1). This provides in part that no expenses shall, with a view to promoting or procuring the election of a candidate at an election, be incurred by any person other than the candidate, his election agent and persons authorised in writing by the election agent on account (a) of holding public meetings or organising any public display or (b) of issuing advertisements, circulars or publications or (c) of otherwise presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate. One political party expressed grave doubts whether this provision was not infringed by the advertisement by certain commercial undertakings of their opposition to part of the avowed electoral policies of that party. Were such advertisements designed to promote or procure the election of a candidate opposed to these policies? They were certainly not directed to or against any particular candidate but it is arguable (though not, in the opinion of the writer, very persuasively) that they were directed to support the cause of all individual candidates who opposed these policies.

We have no space to deal with the many other questions raised by this Act. We have not touched local elections which have already been conducted under the 1948 Act on one occasion. For the moment the dust is settling on the provisions relating to parliamentary elections. It seems unlikely that there will be any opportunity for the amendment of those sections we have criticised before the dust rises again to add to the general obscurity of an election campaign.

J. A. G. GRIFFITH.

ADOPTION OF CHILDREN ACT, 1949

THIS Act, which came into force on January 1, 1950, is one of the series of statutes affecting domestic law, of which the Law Reform (Miscellaneous Provisions) Act, 1949, and the Married Women (Maintenance) Act, 1949, were noticed in the last number of *The Modern Law Review*. The empirical approach of the legislator is shown by the fact that section 4 of the Act, excluding the rule in *Russell v. Russell* in adoption cases, was repealed before it came

into force, and replaced by the wider provisions of the Law Reform Act which abrogated the rule altogether.

Adoption is a recent chapter in English law. The Adoption of Children Act, 1926, was the Legislature's first experiment, and since then nothing has been done except to check, by the Adoption of Children (Regulation) Act, 1939, certain abuses connected with adoption societies. It is therefore not surprising that by 1949, when war conditions had caused an extension both of the practice of adoption and the scope of its problems, several changes in the law were overdue.

The Act effects two major amendments and a number of minor ones.

(1) *Foreign Children*. By section 1 (2) the child to be adopted need no longer be a British subject though he is still required to be resident in England or Wales. This is a step of far-reaching social and political importance which has been accelerated by the problem of displaced European children. By section 8 an adopted child who was not previously a citizen of the United Kingdom and Colonies will become one if the adopter or, in the case of a joint adoption, the adopting father is a citizen. The possibility that problems of conflict of laws may now arise is no reason for regretting this change.

(2) *Property*. Sections 9 and 10 are designed to secure that adopted children are treated as the children of the adopter for the purposes of the devolution or disposal of real or personal property, thus reversing the cautious policy of the 1926 Act. Where any person after the making of an adoption order dies intestate in respect of any real or personal property, except property subject to an entail created before the order, the property now devolves in all respects as if the adopted child were the child of the adopter and were not the child of the natural parents. In any disposition inter vivos or by will made after an adoption order a reference to a child of the adopter is to include the adopted child, and a reference to a child of the natural parents is not to include the adopted child; references to other relationships are construed accordingly. This applies to references whether express or implied, subject to a contrary intention appearing from the instrument, but property devolving with a dignity or title of honour is excepted. Although the date of the intestacy or disposition must be after the commencement of the Act, the sections are applicable to an adoption order whenever made.

There is no doubt that these provisions give effect to public opinion on the subject and the conscientious tribunal will now be relieved from the routine warning that adopting parents should make a new will.

(3) *Other Matters*. Section 1 (1) declares that the power to

make adoption orders has always included the power to make an order in favour of the mother or father of the infant, either alone or jointly with a spouse. This is intended to resolve doubts on the subject, though who felt these doubts we do not know. By section 2 the exceptions to the age qualification of adopters have been slightly extended in the light of experience of the working of the 1926 Act. The adopter must still be 25 years of age and at least 21 years older than the child in ordinary cases, but both requirements are waived in the case of a mother or father of the child, and any relative of the child need only have attained the age of 21. Relative means a grandparent, brother, sister, uncle or aunt, whether of the full blood, of the half blood or by affinity. The old test of the prohibited degrees of consanguinity is abandoned. Throughout the Act a father includes the natural father of an illegitimate child, and relative includes a natural father and anyone who would be a relative if the child were the legitimate child of its mother and father. In the case of a joint adoption it is now only necessary for one of the spouses to qualify.

The rules relating to consents to adoption orders have been re-drafted and appear in section 3. The alterations in the previous law are slight and do not call for general comment, but there is an interesting provision that consent may be given, with or without conditions as to religious upbringing, without knowing the identity of the applicant for the order. If such a consent is subsequently withdrawn only on the ground that the identity of the applicant is not known, the consent is deemed to be unreasonably withheld, and this entitles the court to dispense with it. Consents may be given in writing, without attendance in the proceedings, provided the applicant for the order is named or described in the document. This does not apply to the consent of a mother unless the child is at least six weeks old on the date of execution of the document, and the execution is attested by a justice of the peace. Hitherto the question of accepting consents in writing has been governed solely by rules.

As from April 1, 1950, section 5 provides that an adoption order shall not be made unless the child has been continuously in the care and possession of the applicant for at least three months immediately preceding the order. Previously this was the case only if the adoption were arranged by an adoption society. Notice of intention to apply for the order must have been given to the welfare authority at least three months before the order is made.

A logical addition to the effects of an adoption order is made by section 11 which provides that for the purpose of marriage the adopter and the adopted child shall be deemed to be within the prohibited degrees. The section is retrospective in that it applies to adoption orders made before the Act, but marriages solemnised

before the Act are not invalidated. The prohibition continues notwithstanding a subsequent adoption of the child by another person. By the same section an affiliation order or agreement in respect of an illegitimate child ceases on the adoption of the child, except that if the adopter is the mother and is single the payments continue until she marries.

Discussion is not required of the remaining details attended to by the Act. The general impression is that the bond of adoption has been strengthened and the machinery overhauled; a number of hard cases will no longer make good law.

J. P. LAWTON.

THE LAW REFORM (TESTAMENTARY PROMISES)
ACT, 1949 (N.Z.) *

THIS Act was passed to clear up certain obscurities which had appeared in section 3 of the Law Reform Act, 1944. The purpose of that section was to ensure some compensation to persons who had worked for, or otherwise rendered services to, a deceased person in return for a promise of testamentary benefit, but who had received no such benefit under the deceased's will.

Section 3 of the Law Reform Act, 1944, enacted that where a claim was made against the estate of a deceased person founded upon the rendering of services to or the performance of work for the deceased in his lifetime, and the claimant proved an express or implied promise to reward him for the services or work by making some testamentary provision for the claimant, then, to the extent that the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not the claim could have been enforced in the deceased's lifetime) the claim could be enforced against the deceased's personal representatives just as if the promise of the deceased was a promise by the deceased for payment in his lifetime of the amount specified in the promise, or, if no amount was specified, of such amount as might in all the circumstances be reasonable.

The intention of the section was quite clear, though it added another restriction, in addition to those imposed by the Family Protection Act, 1908 (of which the Inheritance (Family Provision) Act, 1938, is the English counterpart), on the freedom of testamentary disposition. Its purpose was to ensure that persons who had worked or performed services for the deceased in return for a promise such as 'I will remember you in my will' or 'The farm will be left to you in my will' and who were disappointed to find that the promise

* [The hardship dealt with by this Act is of frequent occurrence in England and it is therefore felt that this note on the solution adopted in New Zealand will be of interest—Ed.]

had not been honoured in the deceased's will, could claim against the deceased's personal representatives what they had been promised or, if no specified amount had been promised, what was reasonable in the circumstances.

Since 1944, many claims have been made, some successfully, under the section. But the courts were early faced with some problems of interpretation: *e.g.*—

- (a) Did the section apply if the promise of the deceased related to land, such as a promise to a son to leave him a farm if the son continued to work on it for small or no remuneration—a promise by no means uncommon in New Zealand? Did it apply if the promise related to some specific chattel, such as a promise to leave a race-horse to a trainer if he continued to train the horse? True, there is nothing in the section which excludes such promises, but the general tenor of the section, with its references to 'amount specified' and 'amount as may be reasonable' suggested that pecuniary remuneration was intended.
- (b) Even if the section did relate to land, was the promise caught by section 4 of the Statute of Frauds so as to be unenforceable in the absence of a note or memorandum in writing?
- (c) Did the section apply if the promise had been made in consideration of services having already been performed, or did the doctrine that past consideration would not support a promise apply?

The 1949 Act seeks to answer these questions.

Section 3 of the 1944 Act is repealed but is substantially re-enacted. Further, section 3 of the 1949 Act enacts (*inter alia*) that the promise shall be enforceable even though it relates to real property or to personal property other than money. Section 3 (2) enacts that the section shall apply notwithstanding anything to the contrary in section 4 of the Statute of Frauds and whether the services were rendered or the work was performed before or after the making of the promise.

To ensure that the word 'promise' shall not be interpreted in the strict sense in which it is used, for example, in the law of contract, section 2 provides that the word 'promise' shall be deemed to include any statement or representation of fact or intention.

The remaining sections of the Act deal with procedure and limitation of actions.

The original section in the 1944 Act provided a reform in the law which experience had shown was much needed. Previously the hopes of many people who had, in some instances, given a lifetime of service to the deceased relying on promises of post-mortem benefits were disappointed when the deceased's will was read. But a statutory reform in the law should be accomplished

with reasonable certainty and the instrument of reform should not create new problems when seeking a solution of the old. The Act of 1949 thus becomes a real instrument of law reform.

A. G. DAVIS.

DEFAMATION AND THE PRESS

IN an address to the Women's Press Club given on April 4, 1950, the Attorney-General made suggestions of real importance in relation to the law of libel as it affects the press. Rather unexpectedly the reporters (or was it the sub-editors) for the most part ignored it, and the leader writers were not interested, although Sir Hartley Shawcross' proposals, if accepted, would very much improve the position of the press in this matter. They are certainly deserving of close attention from all interested in this branch of the law, and, indeed, from the public generally, not only for their intrinsic interest, but because they were put forward in such a way as to make it clear that the Attorney-General, if not speaking officially on behalf of the Government, was flying a pretty obvious kite.

In his interesting address Sir Hartley Shawcross contrasted the privileged position of Members of Parliament in respect of defamatory statements with that of the press, the so-called fourth estate, which is comparatively vulnerable. In an aside he went on to show that while M.P.s may in theory bring libel actions when they are defamed in the newspapers, in practice they are well advised not to seek the aid of the courts, at any rate if the attack was in any sense political. Indeed, he took the rather unexpected line of welcoming even exaggerated criticism on the ground that freedom of speech is the very breath of democratic politics.

This led him to express the view that the freedom of the press had been hampered if not unduly limited by legal decisions and verdicts in libel actions, and he gave his support to the claim that 'the protection that the press possesses' should be 'extended'. If this were done, however, a position would be established which would undoubtedly be open to abuse by the less reputable, or more careless journalists.

He accordingly set out to find a means of preventing this. In other professions where within their own limits complete privilege of utterance exists, such as Parliament or the Bar, defamatory statements are prevented or, at any rate, controlled by recognised professional standards and conventions—indeed, at the Bar, there are both the benchers of the Inns of Court to exercise discipline, and the Bar Council to lay down rules of behaviour. The press

has nothing similar, and if it wishes to have similar privileges it must obviously develop something of the same kind. Now it so happens that the recent Royal Commission on the press advocated that a Press Council should be set up, one of the main functions of which was to be that 'of formulating and making effective high standards of professional conduct'. Here obviously, suggests Sir Hartley Shawcross, is the very method of obtaining the necessary discipline for a press no longer fettered by a strict law of libel.

It will be remembered that the Porter Committee advocated a considerable relaxation of the law of defamation in favour of the press, particularly in respect of the *Hulton v. Jones* doctrine which they regarded as unjust (see 12 M.L.R. 221). This part of their recommendations was received with far less general satisfaction than some others, since many of us feel that journalists are only too ready to indulge in the type of writing of which the late Judge Artemus Jones complained in that famous case—it is not generally remembered that Mr. Jones had himself been a contributor to the peccant newspaper, and it is very easy for indirect motives to creep into this type of journalism which it is exceedingly difficult to prove in court. The *Scott v. Shepherd* maxim that he who throws fireworks about must take the consequences is a sound one, perhaps even more with psychological fireworks than with physical ones. Indeed the Porter Committee themselves recognised that it would be unwise to abolish *Hulton v. Jones* without imposing substantial safeguards. Their proposals in this regard did not, however, appear to all of us to be altogether satisfactory.

The establishment of a strong Press Council with disciplinary powers would, however, put a very different complexion upon the Porter proposals, and would undoubtedly lead to the withdrawal of much if not all the opposition to them. Moreover it would furnish a possible solution to another problem to which the Porter Committee devoted much attention but without success, that is the infringement of privacy which is a sin of which the press is perhaps more often guilty than it is of defamation. The Porter Committee took the view that this evil is not to be cured by an extension of the law of defamation at all, and were no doubt right. But the disciplinary powers of a Press Council would obviously extend to this matter, and if effectively used would provide a better remedy than the fear of sporadic actions in the courts.

Although a number of distinguished journalists welcomed the proposals for a Press Council it was not received with marked enthusiasm by newspaper men as a whole, and although it is now some twelve months since the report of the Royal Commission was published nothing active seems to have been done in the press world towards seeking powers to set one up. It is clear that the

Government of the day would be glad to provide such powers, and there is no reason to suppose that the Opposition is not of the same opinion. The next move is with the press, and the Attorney-General was clearly saying in this address 'if you want to get the law of libel amended you must set up a Press Council, and if you are prepared to set up such a Council I am prepared to assist you to get the law of libel amended'. But if the press will not play why should the Government not take the matter into their own hands? After all it is general Government policy to set up responsible councils in different branches of industry under the Organisation of Industry Act, 1948, wherever there is a substantial demand for one in the industry concerned. It is well known that the more responsible and conscientious journalists, the real leaders of the profession, would welcome the setting up of a Press Council. So that if they were to take action on these lines the Government would have a substantial backing in the profession, as well as the wellnigh unanimous support of the great mass of the thinking public.

C.

CORRIGENDA

We regret that in the article on English Legal Training at p. 137, Sir Alexander Carr-Saunders' co-author of *The Professions* was erroneously described as R. A. Wright. The co-author was, of course, Mr. P. A. Wilson, whose name should accordingly be substituted for 'R. A. Wright' at pp. 138 (note 10) and 139 (note 12).

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(3) *Administrative Law.* R. F. FUCHS: Administrative determinations and personal rights in the present Supreme Court, 24 Ind.L.J. 163. R. F. FUCHS: The hearing examiner fiasco under the Administrative Procedure

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W. A. STEINER.

NOTES OF CASES

CONTRACT—SALE OF GOODS—INNOCENT MISREPRESENTATIONS AND CONDITIONS

THE recent decision of the Court of Appeal in *Leaf v. International Galleries* [1950] 1 All E.R. 693, really requires the consideration of a full-length article and this it will doubtless receive in due course. In this note it is merely intended to draw attention to some of its implications, not all of which are considered in the unreserved judgments of the court.

The problem of when a party to a contract loses his equitable right to rescind on the ground of innocent misrepresentation has long been one of the most disputable questions in the law of contract. In connection with sales of goods or choses in action (*Seddon v. North Eastern Salt Co.* [1905] 1 Ch. 326) or of land (*Angel v. Jay* [1911] 1 K.B. 666) it has been answered by saying that rescission is no longer possible once the contract has been executed by the passing of the property in the goods or land. But these decisions have been much criticised¹ (for the latest attack on them, see *Solle v. Butcher* [1949] 2 All E.R. 1107) and it is quite clear that they do not apply to all types of contract. For example, the Partnership Act, 1890, s. 41, implies² that an executed partnership contract may be rescinded for misrepresentation, and it is well established that rescission is possible in the case of executed contracts for the subscription of shares. In these latter cases the test of the loss of right to rescind seems to be whether the party misled has done anything to show an intention to affirm the contract. It must also, of course, be possible for the court substantially to restore the parties to their previous positions, but, since the decision of the House of Lords in *Spence v. Crawford* [1939] 3 All E.R. 271, the requirement of *restitutio in integrum* seems to mean little more than that the court must be able to do substantial justice as between the parties.

It has been suggested that the wider 'affirmation' test only applies to contracts in which there is a fiduciary relationship between the parties and that in other cases the 'executed contract' test of *Seddon v. North Eastern Salt Co.* and *Angel v. Jay* prevails. Obviously the existence of a fiduciary relationship strengthens the position of the innocent party as he will be able to rescind for non-disclosure as well as misrepresentation. But it is difficult to see why the fiduciary relationship should make any difference if there has in fact been a positive misrepresentation.

¹ See 55 L.Q.R. 90 (an article read to the court by the plaintiff's counsel).

² And see *Newbigging v. Adam* (1886) 34 Ch.D. 582, affd. 13 A.C. 308.

The much criticised decisions in *Seddon v. North Eastern Salt Co.* and *Angel v. Jay* have one great advantage; they avoid any question of placing the party misled by an innocent representation not incorporated into the contract in a stronger position than if the representation had been incorporated as a condition of the contract. As regards sale of goods, the Sale of Goods Act, 1893, s. 11 (1) (c) expressly provides that the purchaser loses his right to rescind the contract for breach of a condition if, in the case of specific goods, property has passed or if, in the case of unascertained goods he has accepted them within the meaning of section 35. Similarly, it appears that in sales of land the contract cannot be avoided, for breach of a condition, after the conveyance. If these decisions are wrong the question arises whether it is possible for the purchaser to ignore the breach of condition and proceed instead on the ground of innocent misrepresentation. One has heard of waiving a tort and suing in contract but this seems to be the converse case of waiving the breach of contract.³

Hitherto those judges who have criticised *Seddon's Case* and *Angel v. Jay* have not been required squarely to face this question. In *Leaf v. International Galleries*, however, counsel for the plaintiff had the courage to take these criticisms to their logical conclusion. In 1944 Leaf had bought from the International Galleries an oil painting of Salisbury Cathedral represented as being by Constable, a representation which was held to have been a term of the contract. In 1949 he tried to sell it but found it was not a Constable. In these circumstances he claimed, not damages, but rescission. During the course of the action his counsel's courage partially failed him and he sought to add an alternative claim for damages for breach of warranty but he was not allowed to amend at that stage. The county court judge dismissed the action and Leaf appealed.

The first judgment in the Court of Appeal was appropriately delivered by Denning L.J., the principal critic of *Seddon's Case* and *Angel v. Jay*. He held, following his previous judgment in *Solle v. Butcher (supra)*, that there was no question of the contract being void for mistake, since there was no mistake about the subject-matter of the sale which was of a specific picture of Salisbury Cathedral. It was a term of the contract that the picture was by Constable and this term was either a warranty or a condition. On the facts he held that it was a condition. But Leaf had lost his right to reject under the Sale of Goods Act, 1893, s. 11 (1) (c) since, by retaining the picture for more than a reasonable

³ It has been said ('The Circuiteers', quoted in Holdsworth, *H.E.L.*, Vol. 9, pp. 415-6) that,

'Thoughts much too deep for tears subdue the court
When I assumpsit bring, and god-like waive a tort'.

The suggested waiver of the contract might be expected to inspire even deeper thought.

time, he must be deemed to have accepted it (section 35). In these circumstances could he be in a better position by claiming to rescind for innocent misrepresentation? The learned Lord Justice held that he could not, since although 'an executed contract of sale may, in a proper case, be rescinded for innocent misrepresentation . . . an innocent misrepresentation is much less potent than a breach of condition. A condition is a term of the contract of a most material character, and, if a claim to reject for breach of condition is barred, . . . *a fortiori* . . . a claim to rescission on the ground of innocent misrepresentation is also barred'.⁴

The other two members of the court delivered concurring judgments, Jenkins L.J. repeating his doubts as to the invalidity of *Angel v. Jay*, already expressed in *Solle v. Butcher*. These doubts were shared by Evershed M.R. who made it clear that he was far from agreeing that *Seddon's Case* and *Angel v. Jay* could safely be regarded as bad law. Indeed, it may be suggested that even on Denning L.J.'s arguments, these cases emerge with their authority restored rather than diminished. As we have seen, Denning L.J. argued that Leaf could not rescind because he had lost his right to reject under section 11 (1) (c), and he assumed that it was acceptance that had caused him to lose such right. But strictly this was not so. The goods in question were, as the learned Lord Justice emphasised, 'specific goods' and in these circumstances the buyer, under that subsection, loses his right of rejection when property passes, that is, when the contract is executed. In other words Denning L.J., having kicked *Seddon's Case* out of the front door, lets it in again through the back.

In fact, however, the 'execution' test and the 'acceptance' test scarcely differ in their practical application provided that it is borne in mind that a contract of sale is executed by the passing of property and not by physical delivery (Sale of Goods Act, s. 1 (4)). On the interpretation adopted in *Varley v. Whipp* [1900] 1 Q.B. 513, where the contract contains an unfulfilled condition, property, even in specific goods, does not pass on the conclusion of the contract or by delivery but apparently only on acceptance by the buyer. Hence although the elliptical nature of Denning L.J.'s argument does less than justice to *Seddon's Case*, it does seem that for practical purposes the distinction which section 11 (1) (c) draws between the rejection of specific and unascertained goods can be disregarded and that acceptance can be adopted as the test of the loss of the right to reject and therefore of the right to rescind for innocent misrepresentation. If so, despite the express statutory provisions regarding sales of goods, there does not appear to be any substantial difference between these and other

⁴ The same conclusion, but based upon the rather different reasoning that the misrepresentation became merged in the contract, was reached by Branson J. in *Pennsylvania Shipping Co. v. Cie. Nationale de Navigation* (1936) 155 L.T. 294 (apparently not cited in *Solle v. Butcher* or *Leaf's Case*).

contracts; the rules laid down in section 11 (1) (c) providing the test for the loss of the right to reject and therefore, as it has now been held, to rescind, may fairly be regarded as a statutory expression of the general affirmation test, adapted to the particular case of sale of goods and, in the interests of commercial certainty, made rather more firm and inflexible than the normal common law and equitable rule. As regards sales of land the rule that the right to reject or rescind is lost when the contract is completed by conveyance may also fairly be regarded as an application of the affirmation test. A month or more normally elapses between contract and conveyance during which the purchaser's solicitors carry out the closest investigation, and if after this the purchaser chooses to complete he should be deemed to have 'accepted' or to have affirmed the contract. Despite *Angel v. Jay*⁵ the creation of tenancies may sometimes constitute an exception, as *Solle v. Butcher* suggests, for in such cases there may be no prior contract or investigation so that, as Denning L.J. pointed out in that case, if execution of the lease automatically barred his right to rescind he might lose that right before he had had any opportunity of exercising it.

Leaf's Case therefore answers in the negative and, it is respectfully submitted, answers satisfactorily, the question whether one can waive a breach of condition and rescind for innocent misrepresentation instead. But it still leaves unsettled the question of what the position is if the misrepresentation is never incorporated as a term of the contract. In these circumstances can the buyer rescind for misrepresentation notwithstanding that he did not regard the representation as sufficiently important to merit inclusion in the contract?

Clearly he cannot be in a stronger position than if the representation had been a condition of the contract, for, as Denning L.J. said (*supra*) 'an innocent misrepresentation is much less potent than a breach of condition'. On the other hand it is well established that rescission may be possible notwithstanding that the representation was never incorporated as a term of the contract. And this is as it should be, for the failure to incorporate it does not necessarily mean that the party to whom it is made regards it as immaterial; it may be that he places such reliance on

⁵ Rescission for innocent misrepresentation of an executed lease was in fact granted in *Whittington v. Seale-Hayne* (1900) 16 T.L.R. 181 (not cited in *Angel v. Jay*). But *Angel v. Jay* was recently followed by Devlin J. in *Edler v. Auerbach* [1950] 1 K.B. 359 (decided before, but not cited in, *Solle v. Butcher* or *Leaf's Case*). In *Leaf's Case* Denning L.J. declared that the decision of the majority in *Solle v. Butcher* had overruled *Angel v. Jay* but, although he seems almost to have convinced Jenkins L.J. of this, it appears to be going much too far. In *Solle v. Butcher*, Bucknill L.J. decided the case on the basis of mistake and not misrepresentation, and Jenkins L.J. dissented from Denning L.J.'s opinion upon which alone therefore the alleged overruling depends.

the assurance that he has received that he regards its reiteration as unnecessary.

In these circumstances it is submitted that the only practical answer is that rescission should be permitted only if the representation is of such a nature that had it been incorporated as a term of the contract then, in the absence of any express provision by the parties, the court would have interpreted it as a condition and then only for so long as rejection would have remained possible, that is, until the party misled has accepted or affirmed. If this is correct then the test whether a representation is sufficiently 'material' to warrant rescission is the same as the test whether a term is sufficiently 'essential' or 'fundamental' to be construed as a condition.⁶

This prompts the final question: Is there any difference, as regards rescission, between fraudulent and innocent misrepresentation? Whatever the position may be as regards innocent misrepresentation, it seems to be assumed that in cases of fraud avoidance of the contract (as well as a claim for damages) is possible in the case of any fraud which has operated as an inducement to enter into the contract, even though not material in the above sense. It also seems to be assumed that a right to rescind for fraud lasts longer than in the case of innocent misrepresentation. Fraud is of course more potent than innocent misrepresentation if only because it entitles the innocent party to remedies at common law as well as in equity. Legislative action would be required to equate the two as regards recovery of damages and in certain cases some such action has been taken (e.g. under the Companies Acts). A general extension of a right to damages for innocent misrepresentation would probably do more harm than good, but, since the Judicature Acts, there seems to be no reason why the distinction between the two types of misrepresentation should be perpetuated in the case of rescission or avoidance. If we reject the narrow construction of the meaning of 'executed' as used in *Seddon's Case* and adopt instead the acceptance or affirmation test (which, as we have seen, does not in practice differ greatly from it) there would seem to be no difference between the two as regards the length of time for which the respective remedies remain open. Nor does there seem to be any more reason for

⁶ It is not suggested that the previous authorities support this; on the contrary they generally imply that a misrepresentation is 'material' if it had any effect in inducing the contract (and cf. the statutory definition of 'material' for the purposes of motor insurance in the Road Traffic Act, 1934, s. 10 (5)). On the other hand, the modern tendency favours the construction of terms as conditions rather than as warranties and the tendency applies especially to insurance contracts. In any case the rule suggested seems to be a necessary consequence of *Leaf's Case* if absurdity is to be avoided. It is of course possible to distinguish this case from that in which the misrepresentation becomes a term of the contract on the basis that there is no merger (cf. the *Pennsylvania Shipping Co. Case*, *supra*). But this technical argument does not lessen the practical absurdity of giving greater rights in respect of something 'less potent'.

drawing a distinction as regards the material nature of the misrepresentation which may give rise to a right of rescission in the two cases.⁷ Hence although the judges in *Leaf's Case* were careful to restrict their observations to innocent misrepresentations it is submitted that they may well apply generally.

The purpose of these comments, therefore, is to suggest that on the basis of Denning L.J.'s judgment it is now open to the courts to introduce a most desirable and convenient measure of uniformity into this branch of the law. The conclusions suggested may be summarised as follows:—

(1) Where a representation has been incorporated into the contract the party misled may only rescind the contract if the representation constituted a condition and then only if he acts promptly and before he has done any act of acceptance or otherwise affirmed the contract.

(2) Where a representation has not been incorporated into the contract the party misled may only rescind if the representation was sufficiently material to have been capable of being a condition, and he must take action within the same limits of time.

(3) If the party misled never had, or has lost, his right to rescind his only remedy is a claim for damages which is open to him (a) if the representation constituted a term (whether a warranty or condition) of the contract, or (b) if the representation was fraudulent.⁸

Within the scope of this note it has not been possible to deal with the analogous problem of when a contract is void (or voidable)

⁷ There are, of course, certain other differences flowing from the fact that law recognises fraud but only equity recognises innocent misrepresentation, but these seem mainly procedural. If the misrepresentation is innocent the party misled will be liable to an action for damages if he fails to fulfil his part of the contract, unless he claims rescission. If the misrepresentation is fraudulent, however, he can treat the contract as at an end and successfully defend an action for damages without specifically claiming rescission, provided, if the above argument is correct, that the fraud is of a sufficiently material fact to have been capable of being a condition. If it was not sufficiently material then, it is submitted, he is liable to perform his part of the contract but has a counterclaim in damages. In most cases, however, the innocent party will require the assistance of the court to restore him to his former position and will therefore bring rescission proceedings whether the misrepresentation is innocent or fraudulent. In such proceedings the court has wide powers to do equity between the parties (cf. *Solle v. Butcher*) and the only difference between cases of fraud and no-fraud seems to be that the court will naturally be more unfavourably disposed to the defendant in cases of actual fraud (cf. *Spence v. Crawford, supra*).

⁸ It has been held by the H.L. in a^{*} Scottish appeal that in the case of subscriptions for shares the allottee cannot recover damages against the company for fraud unless he also rescinds because, it is said, one cannot remain a member of a company and at the same time recover damages from the company for inducing one to become a member (*Houldsworth v. City of Glasgow Bank* (1880) 5 A.C. 317). The judgments appear to show a confusion between the corporate company and its members and the reasoning is unsatisfactory. The decision would doubtless be followed but the principle is clearly limited to cases of share subscriptions and perhaps partnership contracts. In the case of other contracts it is clear that damages are recoverable irrespective of rescission.

for mistake, a subject discussed by Denning L.J. in an illuminating if iconoclastic judgment in *Solle v. Butcher*. Nor has it been possible to do more than indicate very briefly a possible method of rationalising the law relating to the avoidance or rescission of contracts for breach of conditions or for misrepresentation. But it is submitted that the three rules suggested above would result in an immense simplification of the latter topic and might unite the two schools of thought represented by Evershed M.R. and Jenkins L.J. on the one hand, and Denning L.J. on the other.⁹ We humbly commend it to their consideration.

L. C. B. G.

'SUITABILITY' FOR CORRECTIVE TRAINING

CORRECTIVE Training now plays a large part in our penal system : if the present flow continues there will be over two thousand corrective trainees in prison by the end of the year. For this reason *R. v. Apicella* [1949] 2 All E.R. 813, is of considerable importance, being the only reported case in which the Court of Criminal Appeal has explained its view of the function of this type of sentence.

Apicella, aged thirty, was convicted at Essex Quarter Sessions of stealing two horses, and was sentenced to two years' corrective training. He applied to the Court of Criminal Appeal for leave to appeal against his conviction. The court, consisting of Lord Goddard C.J., Hilbery and Birkett JJ., dismissed this application; but in doing so expressed their belief that this was not a case in which it was proper for corrective training to have been imposed. As there was no appeal against sentence, that sentence had to stand.

The conditions precedent to the imposition of such a sentence are laid down in the Criminal Justice Act, 1948, section 21. First, there must be a conviction on indictment of an offence punishable with imprisonment for a term of two years or more—Apicella had been so convicted. Secondly, there must have been convictions on at least two previous occasions, after the prisoner attained seventeen years of age, of offences punishable in the same way—Apicella had in 1939 been convicted of unlawful wounding and sentenced to three years' Borstal training, and in 1941 of receiving stolen property and sentenced to twelve months' imprisonment, and these previous convictions were properly proved in accordance with section 23 of the Act. Thirdly, the offender must be over twenty-one years of age. And fourthly,

⁹ It is interesting to note that the Chancery lawyers adopt a more restrictive interpretation of the equitable remedy of rescission than the common lawyer. Possibly this is because they are more alive to the confusion that would be caused to conveyancing if executed conveyances could be freely rescinded.

the court must consider any report made to them by the Prison Commissioners on the offender's physical and mental condition and his 'suitability' for such a sentence—the Prison Commissioners had advised that Apicella was physically fit for and not unsuited to corrective training. When these objective conditions precedent have been fulfilled, section 21 requires that, before a prisoner is sentenced to corrective training, the court must be 'satisfied that it is expedient with a view to his reformation and the prevention of crime that he should receive training of a corrective character for a substantial time'.

In delivering the judgment of the court, Mr. Justice Birkett said: 'Since 1941 there have been no criminal proceedings against him at all, and the conviction of 1941 is the only one of dishonesty against him up to this moment. The mere fact that the conditions of the statute are fulfilled is by no means a reason why a sentence of corrective training should be imposed. The sentence of corrective training . . . is designed, in the view we take, rather to import an extension of the principles underlying Borstal treatment'. For these reasons the Court of Criminal Appeal regarded corrective training as an unsuitable sentence to impose on Apicella.

This conception of corrective training as an 'adult Borstal' owes its origin to the Report of the Departmental Committee on Persistent Offenders, 1932 (Cmd. 4090), where the idea of corrective training was first advanced, and advanced in this form. However, then, and in the Criminal Justice Bill of 1938, and the Criminal Justice Act, 1948, corrective training has found itself closely allied to preventive detention, so much so that in the present Act they are both defined in the same section. There has thus grown up another conception of corrective training as 'junior preventive detention'. There is yet another view of this sentence—as a statutory acceptance of that type of training that for many years has been given to certain selected 'ordinary' prisoners (*i.e.*, those having previous prison or Borstal sentences, as contrasted with 'stars' who have not) in the regional training prisons of Maidstone and Wakefield where they were mixed with 'star' prisoners. Here they were given a fuller life than in the convict or local prisons, with more emphasis on vocational training, and on the personal relationships between staff and prisoners, which are, of course, also basic principles of Borstal training. Within a month of the hearing of Apicella's application by the Court of Criminal Appeal, this third interpretation received the support of the Home Office, the Under-Secretary of State specifically dissenting from the conception of corrective training which Mr. Justice Birkett had stated (Parliamentary Debates, House of Commons, Vol. 470, No. 198, Col. 1493). Whichever of these three views is adopted will not necessarily substantially affect the system of training evolved; but

it will certainly condition the types of prisoners that courts select for this sentence. This same variance might explain the difference of opinion manifest in *Apicella's Case*, for one might legitimately regard him as well suited to Maidstone-type training. Indeed, Mr. Vidler, the present Governor of Maidstone takes that view of *Apicella*. That it should be possible for the Court of Criminal Appeal to express one interpretation, the Home Office another, and a third to be widely believed, is surely most unsatisfactory.

But whatever general view of corrective training is taken, it would seem that the courts stand in need of a much greater understanding of this sentence if they are to adapt it to its statutory purposes of preventing crime and reforming criminals. To guide them the courts usually have, in addition to their own knowledge of the facts of the case, the prisoner's previous criminal record, the police report as to his mode of life and antecedent history, and the report of the Prison Commissioners as to his suitability for corrective training. In *Apicella's Case* the Court of Criminal Appeal made it clear that the court could not escape the full burden of the ultimate selection of those suitable for corrective training by relying entirely on the report of the Prison Commissioners—'the mere fact that the Prison Commissioners report to the court that there is no reason why a sentence of corrective training should not be imposed if the court thinks fit is no reason of itself why corrective training should be given'. And, in fact, the courts do not hesitate to disregard even the negative recommendations of the Prison Commissioners, for of a random sample of 300 records of corrective trainees checked for this purpose, 25 had been reported to the court as unsuited to this type of sentence.

It is submitted, with respect, that to regard corrective training as an extension of the principles underlying Borstal training, or as any other single concept, will not, by itself, greatly assist courts to select appropriate subjects for this sentence. They require a clearer understanding of the present realities of corrective training and of the administrative plans for its future development. Lord Goddard, speaking in the House of Lords on the second reading debate on the Criminal Justice Bill, 1948 (Vol. 156, No. 67, Col. 495), stressed this requirement in the following terms: 'I hope that before this Bill becomes law we in the courts will have what I think we are entitled to have—namely, full information as to what these novel methods of training are'. This information has not been given. Though it may be true that the Prison Commissioners themselves will not fully comprehend corrective training until it has settled down into a working system, it does not seem extravagant to wish that the courts could be given detailed information of its present form, and of what is envisaged for the future.

A brief outline of the scheme of corrective training as it now

functions may further illustrate the need for such fuller information. Shortly after sentence, male corrective trainees are sent to Reading Prison. There they are held for about three weeks, examined and observed by the usual prison staff assisted by two full-time psychologists, and then divided into four streams. One group goes to open conditions at Sudbury Park; another to a medium-security institution at the Verne, Portland; a third to the training prisons of Maidstone or Wakefield (where, like the other prisoners, towards the end of their sentence they may be sent to the open camps attached to these prisons); and the fourth group goes to Chelmsford, or to separate wings at Wormwood Scrubs or Liverpool. This fourth group can see little difference between corrective training and ordinary imprisonment. Those who are totally unco-operative may be sent to Wandsworth Prison, but the opportunity of returning to Chelmsford or Wormwood Scrubs is always available to them. The great majority of women corrective trainees are held in Holloway, though a few are sent to the more open and ameliorated conditions of Askham Grange; those who are unco-operative are sent to Strangeways Prison, Manchester.

This whole system has grown from the interaction between the plans made by those administering the prisons, and the exigencies of receiving, into overcrowded and understaffed prisons, a larger number of corrective trainees than had been anticipated. Nevertheless, the present corrective training system has achieved at least four distinct types of penal treatment, and this number is more likely to increase than to decrease.

The essential difficulty is that of fitting new types of penal treatment around groups of prisoners selected by the courts. The pressure of time at assizes and quarter sessions does not allow protracted consideration to be given to the sentence to be imposed. Thus, we relatively hurriedly select the genus 'corrective trainee', and then spend at least three weeks dividing the genus into four species—in this context, an inverted allocation of time.

Since the Treatment Tribunal, deciding on all sentences after guilt has been established, is excluded from our judicial system as contrary to our constitutional ethos, the best we can hope for is a close understanding by the courts of what is being done and attempted by those departments administering their sentences. For penal experiments such as corrective training this is particularly necessary. This does not involve any infringement of the Judiciary's powers, nor any extension of those of the Executive—it asks merely that the left hand have some knowledge of the operations of the right. The need for a link between the Judiciary and the Prison Commissioners was stressed in a valuable adjournment debate in the House of Commons on December 2, 1949. In this debate, J. C. Maude, K.C., Recorder of Plymouth, argued

the advantages of such a link, and the Under-Secretary of State for the Home Department, Mr. Younger, expressed his department's acceptance of the desirability of some regular meetings and exchange of views between representatives of the Prison Commissioners and representatives of the Judiciary. Such meetings might go a long way to solve the problem raised in *Apicella's Case*; but the initiative cannot, for constitutional reasons, come from the Prison Commissioners.¹

No penal experiment can succeed unless the types of prisoner selected for it are appropriate to the sentence devised. The necessity for some co-operation between the courts and the penal administrators is thus inescapable. If they are to fulfil their functions efficiently; and unless they regard themselves as sufficiently informed already; those charged with sentencing convicted persons to corrective training must either familiarise themselves with corrective training by visiting the different types of corrective training establishment, and keeping in touch with the work being done in them, or they must press their demand for more information.

NORVAL MORRIS.

INSANITY AND RESPONSIBILITY

IN *R. v. Rivett* the Court of Criminal Appeal faced a problem fundamental to the defence of insanity: on the evidence the appellant was both certifiably insane and legally responsible. As yet, the case is reported only in *The Times* newspaper of February 28, but the present note is based on transcripts of the evidence and judgments in the three courts where it was heard.

Rivett, an East Anglian builder's labourer aged 21, killed a seventeen year old girl with whom he had been on terms of close friendship for four years, and sexually intimate for several months. On the night of the murder they had gone together to a cycle shed behind the school where the girl was a pupil and there, after intercourse, he strangled her. The only motive suggested for the crime was that Rivett knew that the girl's parents disapproved of

¹ Since this note was written additional information has been given to the courts. First, in a circular to judges, recorders, and chairmen of quarter sessions, the Prison Commissioners described in outline the present corrective training arrangements. Secondly, the Lord Chief Justice made a statement in the Court of Criminal Appeal on May 2 in which he stressed that there was an appreciable difference between corrective training and ordinary imprisonment. This statement followed a meeting between the Prison Commissioners and the judges then in London, and it is unfortunate that certain factual misconceptions as to the system of corrective training and the prisons set aside for it seem to have remained, and found expression in Lord Goddard's statement. Though both pieces of information are of considerable assistance, neither goes to the basic difficulty revealed in *Apicella's Case*. Such intermittent generalised secondary evidence is no substitute for personal observation, or for some channel through which detailed information may regularly flow.

their association. Since they had so disapproved for many months without effect, and no breach in their relationship impended for at least a year, there is no reason to doubt Rivett's statement, 'I don't know why I done it'. After killing her, Rivett returned home to his father's house. He read a novel for some time and then, shortly after eleven, went out, taking with him a shot gun and some cartridges with which, he afterwards suggested, he intended to kill himself. Later, after visiting a friend and convincing him quite dispassionately that he had killed the girl, Rivett went to the police station and quietly confessed to the murder. Throughout he showed no emotion, and when he was put in a cell at the police station spent a quiet night, sleeping peacefully. It was agreed that even for an East Anglian labourer such phlegm was remarkable.

Rivett was first brought up for trial before Mr. Justice Stable at the Suffolk Assizes. The prosecution informed the court that there was a question as to Rivett's fitness to plead, and a jury was impanelled to try this issue under section 2 of the Criminal Lunatics Act, 1800. Two doctors, including Dr. Tracey, Medical Officer at Norwich Prison, gave evidence that Rivett was a schizophrenic, and certifiably insane. This evidence was not contested: nevertheless, after retiring for an hour and a half, and after seeking further directions from the Bench, the jury found Rivett fit to plead.

Owing to pressure of time, Rivett was not then arraigned, and the trial was adjourned to the Norfolk Assizes. Here the defence applied for the issue of Rivett's fitness to plead to be retried, and although it was only seven days after that issue had been considered, and no suggestion had been made that in that time his mental condition had changed, Mr. Justice Stable acceded to this request. The jury then impanelled agreed with its predecessor, and this despite the fact that evidence of Rivett's certifiable insanity was now strongly reinforced by Dr. Matheson, Principal Medical Officer at Brixton Prison, whose wide experience in these matters is generally acknowledged. Upon arraignment Rivett pleaded guilty. Mr. Justice Stable directed that a plea of not guilty should be entered, whereupon the prosecution presented its evidence of the killing and Rivett's subsequent activities. The defence was based solely on the issue of insanity under the Trial of Lunatics Act, 1883, the evidence of the two prison doctors and another well-known psychiatric specialist being much relied upon, and not contested by the prosecution. The trial jury rejected this defence and Rivett was convicted.

The issue facing the Lord Chief Justice, and Humphreys and Sellers JJ., was therefore, in its essence, a simple one. The medical evidence was unanimous that Rivett was a certifiably insane schizophrenic (four widely-experienced doctors expressing and reaffirming their conviction of this); but he had been found

legally responsible by three juries, acting on technically impeccable instructions from the Bench. Two juries had found him fit to plead, and although there has been a tendency of recent years to equate unfitness to plead under the Criminal Lunatics Act, 1800, with certifiable insanity, it was clear that their verdicts were well-justified in law, Rivett having, for this purpose, sufficient understanding of the nature of the trial—*R. v. Pritchard* (1836) 7 C. & P. 303; *R. v. Keary* (1878) 14 Cox C.C. 143. At all events, under the Criminal Appeal Act, 1907, there can be no appeal from the decision of the jury on this issue. Similarly, as the third jury had found, it was clear that Rivett did not come within a strict reading of the *M'Naughten Rules*, for though agreed on the psychiatric diagnosis, the balance of the medical evidence was to the effect that he knew he was killing the girl, and knew that it was against the law. Consequently, the court dismissed the appeal. The Home Secretary did not recommend a reprieve, and Rivett was hanged.

In the course of a considered judgment, read by the Lord Chief Justice, it was stated that 'the importance of this case, and it is one of importance, is that it gives this court the opportunity to emphasise two matters of cardinal importance to the criminal law. The first is that . . . it is responsibility and not merely insanity that is the true test. . . . The second matter for emphasis is that it is for the jury and not for medical men of whatever eminence to determine the issue. Unless and until Parliament ordains that this question is to be determined by a panel of medical men, it is to a jury, after a proper direction by a judge, that by the law of this country the decision is to be entrusted'. No exception whatsoever can be taken to the accuracy of these points, and were they more widely appreciated much of the loose skirmishing between doctors and lawyers on the subject of the *M'Naughten Rules* would be avoided. However, it is submitted, with the greatest respect, that in this case, as in many others involving problems of insanity and responsibility, we have failed as lawyers in a task that is implicit in the two points that Lord Goddard stressed.

The duties of interpreting and applying the *M'Naughten Rules* lie respectively on the judge and the jury, but these functions must necessarily be performed, at least partly, in the light of evidence given by those who specialise in endeavouring to understand human motivation—the psychiatrists. These tasks create, as the law stands, tremendous problems of comprehension for the jury and of elucidation for the psychiatrist. This was excellently illustrated by Dr. Denis Hill's confession to the Royal Commission on Capital Punishment (Minutes of Evidence 13, Question 3883) that after striving for an hour and a quarter in the witness box to explain the

significance of certain electro-encephalographic traces, he did not think that he had succeeded in making himself understood. Similarly, in Rivett's case, it seems likely that the three juries were considerably confused by the conflict between law and medicine; Mr. Justice Stable and the learned counsel talking in terms of cognition, the doctors in terms of volition, and no explanation of the relationship between them being advanced. Nor is this reconciliation easy to give, the 'mind' posited for purposes of legal responsibility being a 19th century abstraction not existing in reality. But, while as the law stands we assume its existence, we must surely be prepared to consider more fully the effect of diagnosable psychoses on it. Otherwise medical evidence becomes totally irrelevant. How could we assist a jury in a running-down case if our conception of a motor car did not include an understanding of the effect of the absence of brakes?

It can be argued, with force, that such an extremely complex decision should not rest with the jury; while it does, we as lawyers are under an inescapable duty to assist them by familiarising ourselves with the basic concepts of psychiatry. We have far to go. In the course of the judgment in Rivett's case it was said: 'The evidence that he was unfit to plead was that he was suffering from schizophrenia, which is apparently a modern and perhaps more imposing name for what used to be called dementia præcox. This latter expression translated into English means defect of mind existing from an early age'. The translation and history is accurate, but it is a psychiatric truism that for many reasons 'dementia præcox' is a most misleading term. The onset of the psychosis now called schizophrenia need not occur 'early' in the patient's life (pre-pubertal schizophrenia being uncommon), nor need it lead to 'dementia'. Indeed, though the court could not have been considering it, 'defect of mind existing from an early age' is not unlike the definition of mental deficiency within the Mental Deficiency Acts, 1913 and 1927. True, the boundaries of schizophrenia are not accurately defined, and the clinical varieties tend to overlap; nevertheless it is a widely agreed psychiatric concept on the basis of which, on the certification of two doctors, the law is ready to detain a person in a mental asylum—probably for the duration of his life since the prognosis is bad in the present state of our therapeutic knowledge.

There is no real doubt that, at present, schizophrenia is a necessary concept for the diagnosis of mental disorders. Were we to try to explain modern pleading and practice in terms of the 18th century forms of action, and only in those terms, we would be placing ourselves in a situation similar to that in which we place the psychiatrist in a case such as Rivett's.

In a note one cannot embark on a consideration of the merits of the present law of insanity in criminal cases, and as the law

stands no exception can be taken to the decision in Rivett's case, nor to the concluding argument of the judgment: 'Let it be assumed he suffered from schizophrenia, or whatever doctors may call it; let it be assumed that he killed the girl on a sudden impulse; a jury of his country are satisfied that he was responsible, and it is not for this court to say he was not'. But it would seem that if doctors are to give any evidence whatsoever on what is in the last resort a legal issue, we must be prepared to go further to meet them.

The *M'Naughten Rules* work broad justice because we stretch them, and have post-sentence prerogative means of modifying their application. There are proportionately very few psychotics who, when committing a crime, do not in fact know what they are doing, and that it is either against the law or regarded as wrong by society. It is when, as here, the rules are rigidly applied (as they frequently are to homicides with sexual motivations) that their narrowness stands revealed. Their efficacy is at present the subject of much evidence before the Royal Commission on Capital Punishment; and many witnesses have pointed out their procrustean application, their concentration on cognition to the exclusion of volition, and their failure to give any weight to pathological emotional disturbances. But whatever may be the future rules as to insanity as a defence to a criminal charge, they will necessarily involve an analysis, at a certain level, of an offender's mental motivations. This cannot be conducted effectively unless, as lawyers, we are prepared to make an effort to understand the concepts developed by those who devote their lives to a study of the mind.

NORVAL MORRIS.

LEGISLATION BY ESTOPPEL

THE actual decision in *The Falmouth Boat Construction Limited v. Howell*, [1950] 1 All E. R. 538, is not of great importance but some passages in the judgment of Denning L.J. appear to raise important questions. The facts were that by the Restriction of Repair of Ships Order, 1940 (S.R. and O. 1940, No. 142) ship repairs could not be carried out without the 'authority of a licence granted by the Admiralty'. Work had been done by the appellant company, much of it being carried out with the verbal permission of the appropriate officer before a written licence was granted. The licence when granted did not quite cover all the work done, although all of it was carried out with the verbal approval of the licensing officer. The licence contained the usual condition avoiding it if unlicensed work were done and it was claimed that the excess work therefore made the licence void and, since then all the work was illegal, that the appellant company could claim

nothing in respect of it (*Bostel Bros. v. Hurlock* [1948] 2 All E.R. 312). Similarly, it was alleged that following *Jackson Stansfield v. Butterworth* [1948] 2 All E.R. 558, 'licence' must here mean written licence and that therefore the verbal permission did not prevent this illegality arising. Both Singleton and Bucknill L.JJ. were content to find that in this context 'licence' was not thus restricted and that in the present circumstances oral permission was sufficient to comply with the order, hence no question of illegality arose. This interpretation was the more acceptable since clearly it was the basis on which the Admiralty had worked. To that extent the case does nothing more than show that the *Jackson Stansfield Case* did not lay down any general rule but that the form of each type of licence must be considered in the light of the appropriate circumstances.

Denning L.J., although agreeing on this narrow ground, went farther by laying down a broad general principle which however found no echo in the judgments of his brethren. He held that even if an oral licence were not in law sufficient yet there was no illegality since 'whenever government officers in their dealings with a subject take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume. He does not know and cannot be expected to know the limits of their authority and he ought not to suffer if they exceed it'. The learned judge affirmed that it was this principle which he had applied in *Robertson v. Minister of Pensions* [1948] 2 All E.R. 767. It is however noteworthy, that, as applied in the present case, the principle goes much further than in *Robertson's Case*. There the dispute was solely between the 'subject' to whom the representation had been made and the Crown. Here there were involved the rights of third parties since the dispute lay between two individuals one of whom was acting in reliance on the representations of an official. It is conceived that there is a substantial difference between the two sets of circumstances and that what is here admitted is in effect a new form of dispensing power, which thus broadly stated appears, with respect, to be too wide.

It may be that the principle is to be limited to cases where the authority claimed is derived from orders or circulars not readily available to the public. That is the type of case which Denning L.J. had discussed before enunciating the principle set out above. Even on this basis it is perhaps worth noticing that the publication of such forms of sub-delegated legislation as was involved here and in *Blackpool Corporation v. Locker* [1948] 1 All E.R. 85, is possibly envisaged by SI 1, of 1948, and to that extent the difficulty of ascertaining the true position is no greater than in tracing the legal results of other forms of delegated legislation. It would seem

however from the whole judgment that the alleged principle is not thus limited but that such cases are only illustrations of the operation of a broader rule. This reading is made more likely when reference is made to the legislation involved in *Robertson's Case*, none of which was of a sub-delegated type. It is true that frequently it is impossible to state with any degree of assurance the conclusion to be drawn from any series of statutory instruments, but that difficulty is not peculiar to delegated legislation. Ambiguities of draftsmanship are not unknown in statutes. The solution of the difficulties would not however seem to lie in conceding the power of interpretation to the executive nor in endowing, even in particular instances, the interpretation of an official with legal validity.

As between subject and the Crown the alleged rule may well be desirable particularly in view of the supposed inability to sue a servant of the Crown for breach of warranty of authority. Even here it is not a rule which can yet be regarded as established beyond question. Thus the judgment of Cassells J. in *Minister of Agriculture v. Mathews* [1949] 2 All E.R. 724, is entirely opposed to it (see particularly p. 729), although *Robertson's Case* does not appear to have been there cited. Once however the alleged rule is extended beyond this, it appears, with respect, to be conferring too wide powers upon the officials of the Executive. The doctrine of the separation of powers if not to be overrated has still its uses.

J. D. B. MITCHELL.

JUDICIAL COMMENT ON THE FAILURE OF ACCUSED PERSONS TO TESTIFY

*Waugh v. R.*¹ is a case of some importance, because it is the first decision of an appellate tribunal for more than thirty years on the character and scope of judicial comment on the failure of an accused person to testify. Whereas the rule deducible from previous authority was that such comment was entirely a matter for the discretion of the trial judge, this decision of the Privy Council on appeal from Jamaica holds that the right to comment is subject to limits and to appellate control. The decision is of greater importance as the Judicial Committee stated that the rules of Jamaican and English law were identical on this point.

Waugh appealed against a conviction for murder. His story, which was consistently repeated by him several times on the day of the shooting, was that he shot the deceased whom he had discovered with a bag of coconuts on the estate which he, Waugh,

¹ (1950) 65 T.L.R. 554.

was employed to patrol and guard against coconut thieves. He stated that the deceased had attacked him. The story was supported by the fact that a bag of coconuts and an iron tool which Waugh alleged had been used in the attack on him were discovered shortly after the shooting. Waugh did not give evidence at his trial and the judge in his summing up commented on this omission nine times. The appellant argued, *inter alia*, that this conduct of the trial judge constituted a grave miscarriage of justice. The Judicial Committee upheld this submission and quashed the conviction. It is with this ground of the appeal alone that this note is concerned.

Lord Oaksey who delivered the judgment of the Board stated that while it was true that a trial judge had a discretion in deciding whether he should comment on the accused's failure to testify, the very fact that the prosecution was not permitted to comment showed how careful a judge should be in making such comment. The facts showed that Waugh had told a consistent story which was corroborated by the finding of the coconuts and the iron tool. Lord Oaksey further observed that in this case the Board was satisfied that Waugh's counsel was fully justified in not calling him. On the facts the judge's conduct may well have led the jury to conclude that no innocent man would have taken the course of not giving evidence. If the judge had made any comment at all, he ought at least to have pointed out to the jury that the accused was not bound to testify, and that it was for the prosecution to establish its case beyond reasonable doubt.

This, as has been noted, is stated to be the rule of English law. The difficulty is that previous authority, which was not discussed in the judgment, is consistent in holding that the decision as to whether a comment should be made and the scope of such comment is wholly a matter for the discretion of the trial judge. The English cases are all concerned with the Criminal Evidence Act, 1898, under which an accused person is competent but not compellable to testify. In *R. v. Rhodes*² it was laid down by Russell L.C.J. in clear terms that while there might be cases in which comment was unwise, the question was entirely for the discretion of the judge. In *R. v. Smith*,³ though counsel on appeal argued that Scrutton J.'s comments had gone further than any he had previously heard, and were such as to suggest that the failure of the accused to testify was practically an admission of guilt, the Court of Criminal Appeal stated that this was not a ground for quashing the conviction. The judge might comment and it was not for an appellate court to say how far he should

² [1899] 1 Q.B. 77.

³ (1915) 84 L.J.K.B. 2153; 11 C.A.R. 229.

have proceeded in such comment. Again in *R. v. Voisin*,⁴ the Court of Criminal Appeal held the trial judge's comment to be justified and further stated in general terms that the judge's comments were within his discretion and were not matters for an appeal court to review.

In view of this line of authority which has held consistently that the scope of comment is not a matter for review by an appellate court, it is surprising and perhaps unfortunate that the Privy Council in arriving at a different conclusion did not discuss the earlier cases. The Board came to the conclusion, on the evidence, that the defence was justified in not calling the accused. It is apparent that the trial judge who heard the evidence and observed the demeanour of the accused, arrived at a different conclusion. Moreover, although conjecture is not profitable, it is a little surprising that Waugh, whose story had been so consistent, did not avail himself of the opportunity of telling it again. But what is most important is that the Judicial Committee in arriving at its decision, professedly on the basis of English law, has apparently ignored the contrary English authority on the point.

There is no doubt that such comment as was made by the trial judge in this case was bound to have a marked effect on the jury. This, however, did not influence the Court of Criminal Appeal in *R. v. Smith*. It may not be inappropriate to raise the point here whether the privilege conferred upon an accused not to testify is justifiable in principle. As Wigmore⁵ has observed, every claim of privilege involves the exclusion of relevant evidence, and there should be good policy grounds for the exclusion of such evidence. Clearly an accused should not be treated as an ordinary witness who is subject to cross-examination as to character, convictions, etc. In the case of the accused-witness this would be extremely prejudicial in its effect on the jury. The Criminal Evidence Act, s. 1 (f), recognises this by severely restricting the cases in which questions as to the character or previous convictions of the accused or evidence thereof may be introduced. If this safeguard exists, it is submitted that the justification for giving the accused a privilege not to testify is open to question and may merit reconsideration. It may be that some innocent person will convict themselves out of their own mouths, but this is hardly enough in itself to ground a general privilege. However, if the privilege is to be maintained it is submitted that a more restrictive interpretation of its scope, which in accordance with the earlier English authority gives the trial judge an uncontrolled discretion as to the character and scope of comment on failure to testify, is to be preferred to the rule enunciated in the instant case.

ZELMAN COWEN.

⁴ [1918] 1 K.B. 531.

⁵ *Evidence* (3rd ed. 1940), Vol. 8, p. 412.

IRREGULARITIES OF TRIAL

THE right of the accused (and/or his advisers) to hear all the evidence upon which the verdict will be based, so that he should be able to reply to it or to contradict it, is an essential protection of which he must under no circumstances be deprived. It is to be welcomed that the Court of Criminal Appeal in *R. v. Green* [1950] 1 All E.R. 38 has insisted that any denial of this right will ipso facto be regarded as a substantial miscarriage of justice which must of necessity lead to a quashing of the conviction.

In *R. v. Bodmin Justices, ex p. McEwen* [1947] 1 All E.R. 109, at a hearing at petty sessions, the justices had interviewed a witness in the absence of the prisoner and his advisers after they had returned to their room to consider their sentence. The justices expressly declared that they had questioned the witness in the interests of the prisoner, but even so the Divisional Court (Lord Goddard C.J., Humphreys and Lewis JJ.) considered that this course of action could not possibly be justified, Lord Goddard saying :

‘Time and again this court has said that justice must not only be done but must manifestly be seen to be done, and, if justices interview a witness in the absence of the accused, justice is not seen to be done, because the accused does not and cannot know what was said.’

The principle that the conviction cannot stand even if the evidence so given or received is altogether for the prisoner’s benefit or of quite minor importance has now been re-affirmed in *R. v. Green*. Here the Court of Criminal Appeal quashed a conviction because, after the jury had retired, a communication was sent to them, at their request, by the recorder from his private room. Since neither the question nor the contents of the message were read out in court, they remained unknown to the appellant and his counsel. When the matter was raised upon appeal, the recorder stated that his message had concerned a simple matter already previously dealt with in his summing up, and therefore contained nothing material or new, but was unable to recollect details. The Court of Criminal Appeal felt that it had no option but to allow the appeal.

R. v. Furlong [1950] 1 All E.R. 636, decided a short time after, makes it clear that this irregularity might not have been regarded as fatal if it had been certain that the prisoner had not been deprived of his right to contradict. In that case the point upon which the jury, while considering their verdict, had sought and obtained the judge’s guidance was one upon which no argument could possibly have taken place in court. Though the message had not been read out until after the jury had returned their verdict, the Court of Criminal Appeal held that, in contrast to the circumstances in *R. v. Green*, there was no reason to say that

justice was not seen to be done, and therefore no ground for quashing the conviction. It is a nice distinction, but not unreal.

Even outside criminal proceedings, this principle gains considerable practical importance in connection with hearings before the ubiquitous statutory tribunals exercising quasi- or semi-judicial functions. Lord Loreburn, in *Board of Education v. Rice* [1911] A.C. 179, thought that in all proceedings there ought always to be 'a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view'. This opinion has been upheld whenever such matters have recently come before the ordinary courts. In *Moxon v. Minister of Pensions* [1945] K.B. 490, a case arising out of the Pensions Appeal Tribunals Act, 1943, Tucker J. stated :

'... it is, I think, of the essence of "evidence" according to English ideas, when used in reference to judicial or quasi-judicial matters, that it should consist of oral statements or documents in writing which are *made in the presence of or communicated to both parties before the tribunal reaches its decision*' (italics mine),

and held that information communicated by the medical member of the tribunal to his colleagues during their deliberations could not be relied upon as 'evidence' within the meaning of the Act. In *R. v. Westminster Assessment Committee* [1941] 1 K.B. 63, the Court of Appeal held that proceedings under the Rating Act, 1925, must be regulated on judicial principles and must give the parties an opportunity to make any observations they think fit upon matters brought before the tribunal upon which it may found its decision. In *Errington v. Minister of Health* [1935] 1 K.B. 249, an objection under the Housing Act, 1925, was upheld, because the tribunal concerned had heard evidence from one side in the absence of the other party, and had made an inspection on the spot without giving the interested party an opportunity to be present and/or to state his views. The 1949 Rent Control Act, on the other hand, with which a Divisional Court (Lord Goddard C.J., Humphreys and Jones JJ.) was recently concerned in *R. v. Brighton Rent Tribunal, ex p. Marine Parade Estates* [1950] 1 All E.R. 946, appears to give the rent tribunals power to act on their own knowledge and inspection. The Divisional Court therefore had to recognise that these tribunals, while under a duty to hear all the evidence tendered by the parties, are free to act on outside information received from third persons and uncommunicated to the parties.

In their day-to-day work, most of these semi-judicial tribunals are bound solely by the specific wording of the Act creating them. It is well known that even corresponding tribunals in different parts of the country follow a widely divergent practice over which nobody seems to have any control. Semi-judicial tribunals must of

necessity proceed more informally than the courts of law; application of the strict rules of procedure and admissibility of evidence which obtain in the courts in criminal and even in civil proceedings would not be practicable. But given the vast authority which they nowadays wield, it would be dangerous to overlook that they also administer the law. Universal observance of at least certain basic principles of procedure could be secured in these ad hoc tribunals, and as a first step towards it an inquiry into the practical working of this comparatively new machinery would appear to be both desirable and timely.

H. A. HAMMELMANN.

MATRIMONIAL DOMICILE

MUST the matrimonial domicile necessarily be the domicile of the husband at the date of the marriage? Although textbook writers, on balance, would today answer this question in the affirmative, the English decisions have not yet gone so far and, indeed, the Court of Appeal apparently would answer the question in the negative (see *de Reneville v. de Reneville* [1948] P. 100, at pp. 114 and 122). It is interesting, therefore, to note that the Appellate Division of the Supreme Court of South Africa has now decided in favour of the former view, after considering not only the Dutch and South African authorities, but also English, American, French and Spanish. It may be recalled that the writings of Grotius, Paul and John Voet and Huber (who are all cited as authorities in English textbooks on conflict of laws) are sources of the Roman-Dutch common law in force in South Africa today, and are there cited and referred to daily in the courts.

The facts of the case, *Frankel's Estate v. The Master* [1950] 1 S.A.L.R. 220, were very simple. In 1933 a domiciled German married in Czechoslovakia a domiciled Czechoslovak woman without any antenuptial contract. At the time of the marriage both parties intended and had determined to emigrate and establish their permanent home in Johannesburg, where the husband had been promised employment. About four months later the parties duly arrived at Johannesburg and the husband entered his promised employment. The parties continued to live in South Africa until the husband's death in 1948. The sole issue was whether the proprietary consequences of the marriage were governed by the law of the husband's domicile at the time of the marriage, Germany, or by that of the intended matrimonial domicile, the Transvaal; the importance of the point was that by German law the marriage would not have been in community of property, whereas by Transvaal law it would have been, and if the estate could successfully have established the latter as the

governing law, the property liable to death duties would have been halved.

The five appellate judges unanimously confirmed the decision of the two judges of first instance that the property rights of spouses are governed, in the absence of express contract, by the law of the matrimonial domicile and that the domicile of the husband at the time of the marriage is in all cases the matrimonial domicile. They rejected the argument that the governing law should be that of another domicile which the husband intends to acquire immediately or within a reasonable time after his marriage. In doing so, they followed the views expressed in *Dicey* (5th ed., p. 598), *Cheshire* (3rd ed., p. 651) and *Foote* (5th ed., p. 348). One of the grounds for the decision adopted by several judges was the great importance of certainty as to the governing law, which is achieved simply, though perhaps not entirely logically, by taking in every case the husband's domicile at the time of marriage, whereas reference to the intentions of the parties as to a future home (which may well not be carried out for a long time or even at all) would involve difficulties and doubts.

Schreiner J.A. went further and, after referring to the validity or otherwise of the original reasons or supposed reasons for a rule of law, went on to say (at p. 238): 'The certainty of a generally accepted rule should not, without good cause, be weakened by doubts as to the reasons that may have led to its establishment'. This statement is entirely consonant with the practice of the English courts (cf. *Hanau v. Ehrlich* [1912] A.C. 39).

JAMES H. GEORGE.

REVIEWS

CASES AND READINGS ON LAW AND SOCIETY. By SIDNEY POST SIMPSON and JULIUS STONE, with the collaboration of Magdalena Schoch : in three Volumes. [St. Paul, Minnesota : West Publishing Co. 1949. Vol. I, xlv and 692 pp.; Vol. II, xliii and 693-1592 pp.; Vol. III, xlii and 1593-2389 pp. (with indexes).]

It is difficult to know where to start in reviewing this monumental work, and it is difficult to avoid hyperbole in expressing one's admiration for the enterprise, the imaginative thought, the wide and exact scholarship, and the unremitting industry which went to the making of it. Two things however one may say at once. The first is that the book brings home in a way which nothing else could have done the grievous loss which the profession of law teaching and indeed the legal profession as a whole has suffered by the untimely death of Professor Simpson. That he should have lived to see its publication, and to have received at any rate the congratulations of his friends is something for thankfulness. How much of his vitality had gone into the making of it I know from many conversations with him. The strain of preparing it for the press amid other heavy commitments undoubtedly contributed to his collapse.

The second is that the work is of outstanding value—of outstanding value not only to all serious students of jurisprudence, but to every lawyer who has any sort of concern about the position of law and lawyers in the working of society. It is unfortunate that its great length, and consequent cost, will place it beyond the reach of the average English lawyer, but since, as will appear, each volume is in a sense self-contained he might be advised to obtain at any rate Volume II which contains the heart of the matter. To the average English lawyer many of these readings will no doubt appear highly irrelevant since he seldom stops to think about the wider implications of his work and subject. In America however for half a century a wider outlook has been evident, at any rate in the great law schools; though the story told by Sir Walter Moberly in the *Crisis of the University* about the law student who complained to the College President that his professor was wasting time lecturing about the background of the subject, shows that even in America the artisan type of outlook is not unknown.

However, before I begin to comment on some of the points raised by the book it will be as well to give an indication of its scope and contents. By classification it falls into the class of historico-sociological jurisprudence, for it consists of excerpts from books dealing with society in all its more vital aspects, of extracts from decided cases, and of relevant portions of codes and statutes bearing upon the same subject. Book I is historical and is entitled, 'Law and Society in Evolution'. It is divided into four parts dealing respectively with law in a kin-organised society, in an emergent political society, in a rising commercial society, and in an expanding industrial society. I will take the material on the kin-organised society to illustrate the detail of the discussion. Here we have chapters on the basis of social cohesion, the nature of social control, the role of social control, and the machinery of social control in the society in question. Again I will take the chapter on the machinery of social control to illustrate the analysis of the material. Here we have sections on self-help, the wrath of the gods, pressure of group opinion, and undifferentiated legislative and judicial functions. Every primary title in the book is divided and subdivided with similar thoroughness.

Book II is concerned with 'Law in Modern Democratic Society'. It again contains four chapters dealing respectively with the social and ideological background; with interests, pressing and secured; with the machinery of social control through law; and with the limitations of social control through law. The most important of these chapters is that on interests (with the rather puzzling title mentioned), and of this it may be as well to mention the section headings which are (1) the physical conditions of social life: public safety, health, and comfort; (2) the economic conditions of social life including organisation and methods of business enterprise, protection of investors and bank depositors, control of conflicts between business enterprise and organised labour, alleviation of the effects of the business cycle, and mutual assimilation of economic and political institutions; (3) maintenance and progress of social institutions, that is political, domestic, religious and cultural institutions, with an additional section on social institutions and the general morals; (4) the conservation of social resources, dealing with natural resources and human resources including the rising generation, delinquents, defectives, relief of the unemployed and indigent, protection from economic duress, and the conditions of human life; (5) the conditions of individual life and activity, covering (a) mutual interdependence of the conditions of social and individual life, (b) interests of personality, (c) interests of substance, including changing forms and nature of property, promised advantages and the law of contract, and freedom of economic activity, (d) restrictions on the effective protection of secured individual interests, dealing with restrictions in favour of private debtors or tortfeasors, and restrictions in favour of the State or its agencies.

Book III is entitled, 'Law: Totalitarianism and Democracy' and consists of six chapters entitled respectively, the rise of totalitarian politics and ideologies, law under fascist totalitarianism, law under communist totalitarianism, changes in interests secured under totalitarian politics, changes in the machinery of social control under totalitarian politics, law and democracy in a time of change. The most substantial of these chapters—Chapter IV—contains sections on the economic conditions of social life under totalitarianism (industrial enterprise and management, labour, agriculture), social institutions (political, domestic, religious, cultural), the utilisation of human resources (the rising generation, delinquents, defectives, social security, and the maintenance of mass morale, propaganda), repercussions on individual interests (submergence of private rights under fascist totalitarianism, and resurgence of private property under communist totalitarianism). Finally I should perhaps mention the section headings in the last chapter on law and democracy in a time of change, which are, the trend towards collectivism, collectivism and freedom, the maintenance of freedom (the psychology, the economics, the domain of freedom), implications of atomic energy, the internationalisation of positive law, and 'what's past is prologue'.

It may be useful now to indicate the type of sources from which the readings are taken, so I will pick at random a selection of sections over the whole work. For Section 1 of Chapter II in Book I which deals with Absence of Differentiation between Law, Religion, and Morals the authors make their selection from: Hartland, *Primitive Law*; McIlwain, *Growth of Political Thought in the West*; Vinogradoff, *Historical Jurisprudence*; Malinowski, *Crime and Custom in Savage Society*; and Hoebel, *Political Organisation and Law Ways of the Comanche Indians*. The section includes a note by the editors on the orthodox views of the Maine-Hartland school as compared with the heterodox outlook of Malinowski and Diamond. For Section 3 of Chapter III of the same book the extracts are made from the *Twelve Tables*; the *Laws of Aethelbert*; the *Salic Law*; Grueber, *Lex Aquilia*; Gaius, *Institutes*; *Pravda Russkaia*; and Hartland, *Primitive Law*. For Section 1 of Chapter II in Part II which deals with the Rise of Secular Interpreters of Law the authorities are the *Digest*; Glanvill, *Tractatus de Legibus et Consuetudinibus Angliæ*; Bracton, *De Legibus et Consuetudinibus Angliæ*;

Jolowicz, *Historical Introduction to Roman Law*; Huebner, *History of Germanic Private Law*; Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*; Blackstone, *Commentaries*; *Prohibitions del Roy*; Markby, *Elements of Law*. For Section 1 of Chapter IV in Part III which is entitled Displacement of Mechanical by Rational Modes of Trial, the readings are taken from Millar, *Formative Principles of Civil Procedure*; Trevelyan, *History of England*; Glanvill, *Tractatus de Legibus et Consuetudinibus Angliae*; Anonymous, 41 Lib. Ass. pl. 41; Maitland, *The Forms of Action at Common Law*; Thayer, *Preliminary Treatise on Evidence*; *Bushell's Case*, Vaughan 135. For Section V of Chapter 3 of Part V (the Factor of Personnel) the extracts are from: Mott, Albright and Sammerling, *Judicial Personnel*; Lummus, *The Trial Judge*; Warner and Cabot, *Changes in the Administration of Criminal Justice during the Past Fifty Years*; Scrutton, *The Work of the Commercial Courts*; Gellhorn, *Administrative Law*; Report of Special Committee on Administrative Law, American Bar Association; Frankfurter, *The Public and Its Government*; White and Smith, *Politics and Public Service*; Henderson, *The Federal Trade Commission*; Dodds, *The Public's Responsibility for Legislation*. For the subsection on Defectives under Human Resources in the same Part the authorities are: Glueck, *Mental Hygiene*; *Minnesota ex rel. Pearson v. Probate Court* [309 U. S. 270] (commitment of psychopathic persons not convicted of crime); *Buck v. Bell* [274 U. S. 200] (compulsory sterilisation of mental defectives); *Eugenical Sterilisation: A Reorientation of the Problem* (American Neurological Assn. 1936). For Law under Fascist Totalitarianism (Germany) the extracts are from Hess, *Rede Anlässlich der Eröffnungskundgebung des Juristentages* 1936; Frank, *Rede auf der Schlusskundgebung des Deutschen Juristentages* 1936; Loewinstein, *Law in the Third Reich*; Neumann, *Behemoth, The Structure and Practice of National Socialism*. Similarly for Law under Communist Totalitarianism: Vyshinsky, *Sovetskoe Gosudarstvennoe Pravo* (1938); Hazard, *Soviet Law: An Introduction*; Timasheff, *The Crisis in the Marxian Theory of Law*; Volfson, *Semeinoe Pravo* (1938); *Grazhdanskoe Pravo* (1938); Wyzanski, *Book Review* in 60 *Harv. L. Rev.* 677. For the Section on Defectives under Human Resources which may be compared with the authorities mentioned above we have: *Law for the Prevention of Hereditarily Diseased Offspring, Germany* (1933); Deuel, *People under Hitler* (1942); *Law for the Protection of the Hereditary Health of the German People (Marriage Health Law) Germany* (1935); Zierner, *Education for Death* (1941). Finally for 'What's Past is Prologue': Conant, *Education in a Divided World*; Myrdal, *An American Dilemma*; Veblen, *The Theory of the Leisure Class*; Benedict, *Patterns of Culture*; Simpson and Field, *Social Engineering Through Law*; Whitehead, *Science and the Modern World*. The above selection of sources may perhaps suggest that very little use has been made of case material but this is not so, the greater part of the very important chapter in Book II on Interests is composed of extracts from English and American cases of which something like a hundred have been used: they are preponderantly American and to an English reader afford in themselves a fascinating view of American courts at work.

The extracts from non-English sources are translated. Numerous footnotes refer to large numbers of other works and articles, and this documentation is remarkably extensive, the references covering not only American and English works and periodicals but also, at any rate from time to time, German, French, Italian and Russian sources. The Preface, a valuable General Introduction by Roscoe Pound, and the general table of contents is repeated at the beginning of each Volume which can therefore be handled separately, though the indexes which include an author index, an index of texts and government documents, a table of cases (American and British), and a table of statutes (U. S., British and Commonwealth, German,

Russian, Italian, French and several other countries) will be found only at the end of Volume III.

It is hardly necessary to point out that no similar work has previously appeared. Professor Jerome Hall's valuable *Readings in Jurisprudence* is perhaps the nearest for comparison, but it is intended for less advanced students, and is lacking in the immense critical apparatus which is so obvious a feature of this work: the introductory sections to each part, the notes on different schools of thought, the explanatory notes and buttressing quotations are of the greatest value. Much of the continental material, and this is particularly true of Volume III which deals with Fascism and Communism, is not readily available to English readers, so that *Law and Society* is an invaluable source-book if for no other reason.

As was to be expected, apart from the chapters on Totalitarianism, the great bulk of the material is taken from Anglo-American sources, but sufficient use of the leaders of the continental schools is made to give an idea of their respective viewpoints and names such as Savigny, Grotius, Jellinek, Geny, Duguit, Collinet, Planiol appear from time to time, and there are numerous citations of continental authorities in the footnotes. Nevertheless I cannot help feeling that the use made of the great European jurists is hardly in balance for so substantial a work. Apart from footnote references no use is made of Von Jhering; Fustel de Coulanges is hardly used and Kohler not at all; Durkheim is strangely neglected; and considering the very proper importance which is attached to psychological problems by the authors it is strange to find no mention of Petrazycki. This criticism could be further elaborated. It is also a little strange that apart from Holmes no use is made of the American realist school except for footnote references: their work undoubtedly throws light on certain aspects of law in society.

It is gratifying to an Englishman to find how substantial is the use made of English material. Closer consideration however shows that where this preponderates is in the early chapters where names like Maine, Vinogradoff, Hartland, Malinowski, Diamond appear frequently. In the case material, too, many interesting English judgments are used, but among the later legal writers English names are not many, and English readings are mostly taken from political or sociological writers.

Apart from its value to students as a comprehensive survey of the sources, the book is of fascinating interest to any lawyer, containing as it does vast pools of legal and sociological lore of all kinds into which he can plunge at any point or time for refreshing draughts. As a prose anthology it is probably unique and second only in interest to the *Encyclopædia Britannica*. Take the section on Social Institutions and the 'General morals' for example and compare the case from 2 Campbell's Reports about the prosecution of the soldier who bathed naked off the shore near Brighton with the modern prosecution of hikers for passing through the city of Yonkers improperly dressed. There are interesting and encouraging American cases on the censorship—the judgment of Donahue J. in *Commonwealth v. Forever Amber* [32 Mass. L. Q. No. 2, 79] is as noteworthy for its wit as its good sense: 'The book by its very repetition of Amber's adventures in sex acts like a soporific rather than an aphrodisiac. While conducive to sleep it is not conducive to a desire to sleep with a member of the opposite sex.' And what a stroke of genius to include the well-known case of *Pratt G. K. v. Pratt P. and Mugg*, as reported in Herbert, *Uncommon Law*, which throws more light on the working of the Divorce Court than the majority of cases reported in the official Law Reports. How up-to-date is the material may also be judged from the inclusion of a substantial extract from the speech of Jowitt L. C. on the problem of consummation of marriage when contraceptives are used in *Baxter v. Baxter* [1948] A. C. 274.

It would be possible to devote a whole issue of this review to a consideration of the many topics brought before the reader in these pages, or to picking

out and commenting on numbers of the cases and readings which are here placed before us. I hope however that I have said sufficient to make my readers understand the scope and interest of the work. Personally, I have found the time which I have spent working through its pages over the last few months extraordinarily rewarding. It has been one of the most refreshing and stimulating experiences that I can remember.

C.

THE INSTITUTIONS OF PRIVATE LAW. By KARL RENNER. Edited by O. KAHN-FREUND. [London: Routledge. viii and 307 pp. 21s.]

THOUGH Dr. Renner's well-known book belongs to a different age from ours, it still remains the best effort so far made to apply Marxist analysis to legal problems. Now, excellently translated by Dr. Agnes Schwarzschild, it appears for the first time in an English dress, with a remarkable introduction, and most valuable notes, by Dr. Kahn-Freund. The degree, indeed, to which Dr. Kahn-Freund has enriched not merely the book itself, but the whole field of sociological jurisprudence, by his massive scholarship, his keen eye for the distinction between the living and the dead, and the ease with which he moves amid the complex legal literature of two very different legal systems is quite beyond praise. Even if Dr. Renner's volume were not worth translating for its own sake, in the form it has been given by Dr. Kahn-Freund it possesses something like classical stature. He has given us an admirable example of what it means to regard the social sciences as one, and to utilise their findings to bring out the meaning of legal forms.

The central task Dr. Renner set himself when he wrote his book was to inquire why, though legal norms may remain unchanged in any given society, yet those same norms may be found performing one social function at the beginning of a period, and a wholly different one at its close. He approaches the problem as a member of the positivist school, insisting that all law is a system of commands from a legal superior to its legal inferiors, and argues that what the law does is not to create social transformation, but to accept it as the expression of social changes effected from outside itself. He illustrates his views by analysing, with skill and penetration, the institution of private property in a capitalist society. As he saw, differently either from the society of feudal times, or from the character which any socialist society would assume, the inherent nature of a capitalist society was its refusal to have an order of goods or an order of labour, and, indeed, practically to refuse to society a functioning state-power in order to free the will of the individual citizen from the constraint imposed upon his use of his property. A capitalist system, therefore, sought, through its legal norms, to make the social process an immense accumulation of individual decisions unbound to any social function. The state-power protected property, whoever its owner, and however he cared to use it. It refused to compel men to work since that would destroy its primary principle of freedom of contract. It sought to abstain from looking upon property as anything more than my right to do what I wish with some definite object that is mine, whether the object be a piece of land, a book, or a factory. The 'pure' norms of a capitalist country seek to make public law into private law. They seek to make all social relations contractual relations, in which one person with a free will comes to an arrangement about purchase and sale with another person whose will is also free. Property, when unhampered by the interference of the state-power, thus co-ordinates human relations without destroying freedom. To adapt a famous sentence of Mr. Justice Holmes, in the ideal capitalist country, its legal norms, whether made by a legislature or made by a court, are seeking to enact Mr. Herbert

Spencer's *Social Statics*. With absolute ownership and personal freedom everything is present to make a genuine society; the norms of private law can create the ordered system of superiority and subordination which is necessary to transform the chaos of an atomised state of nature into the cosmos of an ordered society in which the 'invisible hand' infuses human relationships with the teleology necessary to the unity which permits survival.

Yet, in fact, of course, we know that the static character of legal norms is purely conceptual and completely unreal. Since society is always dynamic, behind norms which often seem timeless there is infiltrated into the formal appearance a functional content which alters their inner essence at every turn of the road. The owner cannot in fact do what he will with his own; his will is always limited by decisions from outside it which make the direction of his will move in certain ways to certain ends by which he is bound, is, indeed, increasingly bound. All private property turns out, in practice, to be obliged to subordinate itself to social obligations which limit its power to regard itself as a source of sovereignty. This is to say that legal norms are only apparently unchanged; at some time they must either be interpreted in terms of purposes their makers never foresaw, still less desired, or they are overturned by those who can no longer accept what the original purposes do to the citizens of a society. Dr. Renner shows in a brilliant way that, profoundly as the law influences the relations of production, it can only maintain itself as law by a continuing adaptation, in any society, to the proportionality between the forces of production and the relations of production. In the society where this adaptability fails, either regulation changes the legal norms, as in the law of housing, or the establishment of minimum wages or maximum hours of labour, or the effort of the state-power forcibly to maintain legal norms which do not admit of adaptation is performed by extra-legal means. In the illustration of this immense historic process, Dr. Renner is able to show how Marx's philosophy of history is, thus far, the most valuable guide that we possess.

Dr. Kahn-Freund, in his illuminating introduction to Dr. Renner's book, has rightly drawn attention to the two aspects of it in which its approach is no longer satisfactory. Legal positivism has no longer the confident status as doctrine it possessed nearly half a century ago. It expressed, in an important way, the outlook of a society fairly confident of itself, in large degree able to assume that the principles of a *laissez-faire* economy were the rule, and not, increasingly, the exception, where the institutions of private law were as much liable to change as the price-system of a self-regulating market. It is, of course, obvious that legal positivism has been profoundly undermined by the economic changes of almost half a century. Two world wars, inflation and unemployment upon a scale not previously known, perhaps, since the economic revolution of the sixteenth century, have made it far more difficult for the supposedly neutral legal norm to preserve its form while changing its substance than it was when it did not seem unreasonable to regard private property as, in fact, an important means through which the sovereign power found its road to objective expression. Yet I agree with Dr. Kahn-Freund that the decay of economic individualism has by no means rendered obsolete Dr. Renner's insistence that the outward appearance of many legal norms is tacitly preserved by judges even when they are fully aware that it is obsolete. Dr. Kahn-Freund gives some illuminating examples from the common law in the law of contract and the law of negligence. I think he could well have gone further and argued that the judge is rare who will not, if he can, modify and mitigate and minimise the will of a legislature, for example, because he has become so accustomed to think in terms of respect for ancient legal norms that he will make of them a higher law to which Parliament or Congress, a Government department or a State Legislature, must be compelled to conform, even if each of them has formally announced its decision to abandon conformity.

Certainly, it is not an exaggeration to say that this is the angle from which most—by no means all—the judges in the higher courts of Great Britain and the United States have approached the relation of the historic norms of the common law to those norms of administrative law which deliberately set out to innovate. I should not myself have described any court in which, in England, Lord Bramwell or Lord Sumner, or, in the United States, Mr. Justice Brewer or Mr. Justice McReynolds, were members as 'spectators of the great social drama, serene and imperturbable', even though 'they suffer all the agonies and fight all the struggles of an actor in the play'. No one who reads the opinion of Lord Sumner in *Roberts v. Hopwood*,¹ or the dissent of Mr. Justice McReynolds in *Ashton v. Cameron County District*² would be tempted to describe them as 'spectators . . . serene and imperturbable'; they were, on the contrary, part of the inner general staff of a great fighting army. When great social issues are at stake, the judge is all too rare who will, like Mr. Justice Holmes in *Noble State Bank v. Haskell*,³ consciously sacrifice his knowledge of what is expedient to an institution which embraces the obviously foolish out of obvious ignorance. Dr. Kahn-Freund quotes with warm approval the famous passage in *The Common Law* in which, nearly seventy years ago, Mr. Justice Holmes declared that 'as the law is administered by able and experienced men', [they] know too much to sacrifice good sense to a syllogism'.⁴ But it is well known that, after the passage, in 1896, of the Workmen's Compensation Act, A. L. Smith M.R. was nothing so much as the leader of a small group of judges whose sense of public policy drove them quite precisely 'to sacrifice good sense to a syllogism', even though they were 'able and experienced men'. And anyone who compares the famous *Mogul Case*⁵ with *Quinn v. Leatham*⁶ will be interested in speculating just why Lord Brampton could arrive at the conclusion that the effort of a trade union to protect its members from unemployment is, somehow, different in kind from the effort of a combination of shipowners to protect their market from competition. 'Able and experienced men' whose emotions are, perhaps unconsciously, seriously engaged when they sit upon the Bench, do not seem to me, all in all, to act very differently from 'able and experienced men', also emotionally affected, who do not sit upon the Bench. Men as different as Mr. Justice Miller and the late Franklin Roosevelt, Lord Citrine and Mr. Winston Churchill, are all at one in their broad acceptance of this view.⁷

As Jhering put it, in the title of his famous book, there is a never-ending 'struggle for law'. And granted, as Madison said in the tenth number of *The Federalist*, that 'the only durable source of faction is property', all the major characteristics of law in any particular society at a given time, will be determined in any modern society where the instruments of production are privately owned, by the relations to which the system of ownership gives rise. In the first third of the nineteenth century, this was a commonplace to which men as different as Daniel Webster and Guizot, de Tocqueville and Lord Eldon would all have given their assent without much difficulty. The great turning point began to emerge with the birth of the Chartist Movement in England, the famous strike at Lyons in 1834, and the dissatisfaction with the system of which, perhaps, Metternich was the symbol, which is found alike in the Decembrist revolt in Russia, and the emergence of Left Hegelianism in France. Thenceforward, the tide of

¹ [1925] A.C. 575.

² [1936] 298 U.S. 513.

³ 219 U.S. 104, 575 (1911).

⁴ *The Common Law* (Boston, 1882), pp. 35-6.

⁵ *Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] A.C. 25.

⁶ [1901] A.C. 495.

⁷ Cf. my *Trade Unions in the New Society* (N.Y., 1949), Chap. 3 *passim*, and especially pp. 106-13.

class-conflict mounts steadily until the great revolutionary outbreaks of 1848. It is only thereafter that the effort is continuous to prove that there is a necessary harmony in society, and that the law, above all in the courts, sets out with a serene and majestic impartiality to see that this harmony is maintained. There are many passages in the writings both of Marx and Engels in which they made it clear that they were aware of what this effort was intended to conceal; but neither of them was able to show in any detail how the changing character of productive relations changed also the substance of the law, even while it permitted the professional lawyer to use old categories and old names for what were, in fact, completely new things. Dr. Renner's book was the first attempt, of outstanding quality, to show how this occurred in one great field of law; and it should be added that a half-century of further research has not, even when the great volume of investigation in Soviet Russia is taken into account, produced a better example of what Marxism applied to law might hope to reveal. Set as it is in a contemporary background by Dr. Kahn-Freund in a remarkable combination of learning and imaginative insight, it ought to evoke that re-examination of the bases of the Common Law in England which Bentham began, and Holmes sought to continue until his judicial duties confined him to occasional forays only into the subject. In other fields, there have been promising beginnings, though their area has been small. The supreme need is to look at the whole of our law in terms of Marxism, and with the courage and sense of urgency that made Bentham so unique a figure in English legal history. Not the least of Dr. Kahn-Freund's services in editing Dr. Renner's book is that he has re-emphasised to all who read him how much we could hope for from a Marxist school of jurisprudence.

HAROLD J. LASKI.

LAW AND THE MODERN MIND. By JEROME FRANK. [London: Stevens & Sons, Ltd. 1949. pp. xxxi and 368 (with index). 25s. net.]

Few if any works on legal theory have had a more stimulating effect on our generation than this essay by Judge Frank, which first appeared in the U.S.A. in 1930. Although the author's pen has since that time been very active, and although other members of the same school have been far from silent, chiefly perhaps in the pages of the reviews, it remains the best statement of what has been called the 'new realism', and Messrs. Stevens are therefore to be congratulated upon making it available for English readers, to whose attention it can be heartily commended.

It is particularly good that the book should be readily available, because Judge Frank's views, expressed as they sometimes are with over-emphasis, and even exaggeration, have been a good deal misrepresented by some of his orthodox critics, and it is well that English lawyers should be able to discover from his own book what exactly his thesis is.

The thinking of the American 'realists' derives from Holmes, who was sceptical of orthodox legal conceptions which he considered as often nothing more than outworn dogmas, and looking for some more realistic foundation for legal thinking was driven to find it in what judges actually do in courts. For a long time Holmes was a voice crying in the wilderness, but eventually the dams burst and a torrent of legal scepticism poured out. The 'realists' do not form a school or hold to any one body of doctrine. They are united only in being sceptical of the classical theories which held sway in the Law Schools when they were young, and are 'realists' only in the sense that they endeavour to probe beneath the conventional picture which judges and professors have

given to the world of the way the law works, in order to discover what really goes on in courts and lawyers' offices. In his preface to this the sixth American printing Judge Frank expresses a wish to abandon the term 'realist' in favour of 'constructive sceptic', partly on the ground that the term 'realist' already has a well-known meaning in philosophy, and that a meaning which bears no relation to that which it possesses here. It seems unlikely, however, that his desires will be granted: a title of this kind once given, or assumed, tends to stick.

The 'basic legal myth' which Judge Frank attacks is that of certainty. Not only does he think that the law cannot be certain, but he is sure that it would be an evil thing for the community if it could be. But lawyers believe or pretend that law is certain, thus deluding themselves, and what is more important the public, which, brought up against the hard fact that the law which they purchase at a great cost is not by any means certain, declaim against the dishonesty of lawyers.

Why this obsession with certainty? Our author does not much like the common-sense explanation that certainty is necessary if civilised life is to go on at all, and seeks a number of other explanations largely of a psychological character. Here we have one of the most valuable and interesting aspects of Judge Frank's work. Since Petrazycki very little attention has been paid to the psychological basis of law and, of course, his work was done before Freud had revolutionised thought on this subject. Judge Frank without being a disciple of the great psychoanalyst is well versed in and generally sympathetic to the teaching of the psychoanalytic school of psychology, and has been one of the first to submit the workings of the legal mind to the flood of light which that school has been able to pour upon the workings of the mind in general.

Nevertheless I still feel that there is a great deal to be said for the common-sense view about certainty. Civilised life, and especially civilised life in modern communities, is just not possible without a high degree of certainty in respect of the rules of conduct which govern it. The attempt to secure this by the ruthless application of logical extension is no doubt open to all the contempt which Judge Frank, following Holmes, pours upon it, though even so those who try it, whom he attacks as 'Bealists', from the name of the late Professor Beale, one of their most distinguished leaders, have done great service to legal theory. But Holmes, Frank, and their school have run too far to the opposite extreme in founding the law entirely on what judges decide in courts of law. Practical jurists are always too much preoccupied with courts; as Lord Bowen remarked, in a phrase which has never had the attention which it deserves, they see the 'pathology and not the physiology' of the subject. To describe law as what courts do is really a form of 'Bealism' and just as unrealistic as to appraise the human animal from operations carried out upon his body in hospitals. Both events throw a lot of light on the working of their subject-matters, but the actual working goes on quite independently of either courts or hospitals.

Nobody could agree with Judge Frank more than I do about the importance of maintaining fluidity, but as Pound has pointed out it is at the growing points that we need this fluidity; after all if the backbone were to become fluid the body would collapse. As with life generally the problem here is that of maintaining a balance between elasticity and rigidity.¹ Pound was quite right when he said that the economic order requires certainty, and Judge Frank appreciates to the full the strength of Pound's position on this point, for he returns to the subject more than once, but the weakness of his case is demonstrated by the unreality of his argument. Pound has said, for example, that the rules governing payment in commercial transactions must be very clear and certain and he instances bills of exchange and promissory notes. It is a good illustration.

¹ I have discussed this problem in some detail in respect of the rules of mercantile law in 'The Conflict of Law and Commerce', 48 L.Q.R. 51.

Although there may be still a few growing points in this branch of the law the central rules are no longer in any sort of doubt. The holder in due course of a bill has a moral certainty that the acceptor will pay, providing always that he is solvent, which is a trade, not a legal, risk. No, says Judge Frank, the holder may be met by several possible defences. This is, of course, true, but the purely legal defences such as *non est factum*, bill never delivered, etc., are so rarely operative that Judge Frank is driven to put the defendant to the extremes of going into the witness-box to commit perjury, and to the even more unlikely assumption that the court will believe him, in order to ensure that the holder's reasonable belief that he will get his money may be defeated.² But actually, of course, this sort of thing does not happen once in a hundred times, and if the betting is 100 to 1 in my favour it is 'certain' enough for me. If I engage a chauffeur it is, of course, possible that he is in the last stages of heart disease and will die at the wheel while driving me along the edge of a precipice, and no doubt life is to this extent, and in many other ways, 'uncertain', but if that were all Judge Frank meant he would have written a great many books to state the obvious. Of course he does not mean that at all, but he seems to have persuaded himself that the position of the holder of a good commercial bill is in fact uncertain—perhaps he ought himself to consult a psychoanalyst.

In the vast majority of commercial transactions there is no question of litigation ever arising, and the picture which Judge Frank draws of the wise legal adviser who can never conscientiously give his client legal advice which is certain in its effect is quite unrealistic. Suppose, as happens thousands of times every year, a solicitor is advising his client on the formation of a private company: he will tell him of a whole set of requirements under the Companies Acts which are drafted in perfectly clear language and which can be and are observed without difficulty. When the company has been incorporated he will tell him of a further set of rules, in regard, for example, to making annual and other returns. There is no difficulty about these either. Moreover the solicitor will be able to tell the client with something like one hundred per cent. certainty what will happen to him if he by inadvertence neglects to comply with one of these rules. This is a much more accurate account of how the law 'really' works than is the account of the system which appears in Judge Frank's writings, which is calculated to fill any layman with 'despair and despondency'.

I have taken up a great deal of space in criticising Judge Frank's central thesis, which has not, of course, met with much support among legal writers. It has, however, been vastly stimulating to thought and to discussion. Moreover his concentration upon the work of courts has led him to pay particular attention to the problem of the judicial process, and especially to that part of it which is concerned with the elucidation of fact. A great deal of lip service has been paid to the importance of fact finding, but the fact remains that prestige centres about law finding, which is, as Judge Frank points out, in reality law making. This rather unfortunate tendency has increased with the growing power of the Law Schools over the last half century or more. If the Frank School has started a trend in the opposite direction, and it is as yet too early to judge of this, it will have rendered an invaluable service to the administration of justice. This side of his work, upon which he has concentrated a great deal of his later books, seems to me to be more likely to produce fruit of permanent value than is his tilting against orthodox jurisprudence.

The later part of *Law and the Modern Mind* is devoted to an appraisal of the attitude of a number of eminent modern jurists to this so-called 'basic myth' of certainty and contains some acute criticism of the work of Pound,

² Judge Frank relies so frequently in his writings on perjury for the purpose of defeating litigants with 'cast-iron' cases, see his new book *Courts on Trial*, that one is forced to assume that there is a great deal more perjury, and more successful perjury, in America, than occurs in England.

Ihering, Demogue, Wurzel and Cardozo. The thinking of Holmes, of course, dominates the whole work, which not inappropriately concludes with a short summary entitled 'Mr. Justice Oliver Wendell Holmes, the Completely Adult Jurist'. There are no less than ten appendices, in several of which the main argument of the book is elaborated, and it is difficult to see why the work, which is of high quality, should be relegated in this way: I refer particularly to the notes on Rule-Fetichism and Realism, and to the notes on Fictions.

Those readers who are not familiar with the work of Judge Frank will enjoy the wide scholarship which he has so completely at his service. Other legal writers may be more profoundly versed in the literature of the law itself, but I am acquainted with no one who is able to make such felicitous use, both in illustration and argument, of material from the arts, literature and music particularly, from philosophy, from psychology, from anthropology, from semantics, from the natural sciences, indeed from almost every branch of thought. In his later work it is not unusual to find our author still elaborating the themes of *Law and the Modern Mind*, but doing so with such a wealth of new allusion that it remains a pleasure to read the old argument—it is rather like, to 'say it with music', Beethoven's piano sonata in E major, Op. 109, which has no less than six variations in the final movement!

C.

TWENTIETH CENTURY LEGAL PHILOSOPHY SERIES : VOL. III, LATIN-AMERICAN LEGAL PHILOSOPHY. By LUIS RECASÉNS SICHES, CARLOS COSSIO, JUAN LLAMBÍAS DE AZEVEDO and EDUARDO GARCIA MÁYNEZ. With an Introduction by JOSEF L. KUNZ. Harvard University Press. [London: Geoffrey Cumberlege, Oxford University Press. 1948. xxxvii and 557 pp. 48s.]

THIS book is one of the Twentieth Century Legal Philosophy Series published under the auspices of the Association of American Law Schools. Its purpose is to present to Anglo-American readers the views of the best modern representative writers on legal philosophy in Latin-America.

It has taken a long time to review this book, but the excuse must be that it is not easy reading. Thus some effort is required to understand clearly what Professor Carlos Cossio means in his essay on 'Phenomenology of the Decision' when he writes (at p. 356): 'Comprehension seems somewhat like intellection: it also is a seeing with intelligence, but it is not a seeing which implies nothing more than the seeing, for it is a seeing which sees the coming to see which refers the seeing to the I . . . On the other hand in the comprehension of what is seen it is seen with the quality of seen because this quality forms the being of what is seen: if what we love we love with the quality of beloved it is because that being beloved forms the very object loved'. The author adds that 'this example is particularly illustrative'.

It is doubtful whether the English reader would be able to understand with much profit the essays in this book if he did not have the admirably clear introduction by Professor Josef L. Kunz to act as a guide. He begins by pointing out that there is no Latin-American Legal Philosophy in the sense of original and typically Latin-American thought as it is based in large part on a restatement of European philosophical ideas. During the Nineteenth Century the predominant influence was French, but in recent years the South Americans have turned to German and Austrian philosophy and jurisprudence. It is the Phenomenology of Edmund Husserl which has had the greatest influence. His intuition is a special faculty of understanding, an 'intellectual' or 'eidetic' intuition. Those who have not achieved this 'eidetic' intuition will find part of this book hard going. It is also necessary to understand the philosophy of Heidegger who holds that all human existence is 'being-in-the-

world', or, as Ortega y Gasset expresses it, 'co-presence of the world with me and of me with the world'. Judging from this book the German influence has not been altogether a happy one. The originally vague German ideas, transliterated into Spanish, and then finally translated into English, leave the reader with the feeling that he is engulfed in a fog penetrated only occasionally by a ray of light.

The first 340 pages consist of a translation, by the distinguished scholar Professor Gordon Ireland, of Professor Luis Recaséns Siches's book 'Human Life, Society and Law'. Siches was born in Guatemala, but was taken to Spain in early childhood. After studying under Stammler and Kelsen he became a professor of law at the Central University in Madrid, but with the outbreak of the civil war in Spain he went to Mexico where he became professor of philosophy of law in the National University.

In the first part of his book Professor Siches discusses the problem of human life, of free will, of culture as a system of functions of human life, and various other philosophic questions. Having established his basic principles, he then distinguishes between law and morals, the essence of the juridical norm consisting (at p. 85) 'in employing, if necessary, all means to avoid that there shall be produced behaviour contrary to what it ordains and to impose that at any cost'. This would seem to exclude religious, international, and customary law, as no one of them can be explained as being based on force. He then defines positive law as the will of the State expressed in juridical norms which rest in the final instance on the constitution. The validity of the constitution must be taken for granted by the jurist. We thus reach Kelsen's hypothetical fundamental norm. Professor Siches departs, however, from Kelsen when considering the nature of the State and its relation to law. Although it is true, he says, that from a strictly juridical point of view the State expresses itself only as law and by means of law, nevertheless, we must recognise that it is founded originally by a social reality. In the final part of his work Professor Siches discusses the philosophy of juridical values. This is extremely interesting as his analysis of the various theories that have been advanced on this subject is original and acute. His own conclusion is that 'security presents itself as a great good when it is put at the service of the supreme values of individuality'.

Carlos Cossio is Professor of Philosophy of Law in the National University of La Plata. His essay is the introduction to his book on 'The Egological Theory of the Law', and, as may be judged from the extract quoted above, is not easy reading. He says (at p. 348) that 'unlike juridical rationalism, the egological theory considers that the objects to be known by the jurist are not rules, but human conduct viewed from a certain particular angle'. This sounds like the extreme American realist school, but Cossio does not accept the resemblance. Perhaps the most interesting, and certainly the most lucid part of his essay is that in which some of the actual decisions rendered by the courts are analysed and discussed.

Professor Juan Llambías de Azevedo of the University of Montevideo contributes a brief essay on 'The Eidetics and Aporetics of the Law'. He reaches the conclusion that 'we may define positive law—as a collective object—as a bilateral and retributive system of dispositions proposed by man to regulate the social conduct of a circle of men and as a means of realising the values of the community'.

The volume concludes with two essays by Eduardo García Máynez, Professor of Philosophy of Law in the National University of Mexico. The first one entitled 'The Philosophical—Juridical Problem of the Validity of Law' is, in large part, a defence of natural law, an expression of 'faith in the existence of absolute values'. The author takes the position that law, to be valid philosophically, must realise objective values of which justice is the highest. The second essay on 'Liberty as Right and Power' is an exercise of great value in analytical jurisprudence. The conclusion reached by Professor Máynez

is that legal liberty is the authority, granted by the positive law to every person to exercise or not to exercise any right, in so far as the content of the right in question is not reduced to the performance of the person's duty.

Professor Kunz in his introduction to this book says that 'a knowledge of the most significant Latin-American writings in jurisprudence will obviously contribute to the understanding of our neighbours to the south'. It cannot be said that such an understanding will be acquired easily in these pages, but the time spent in reading them will not have been wasted, for what is contained in them is both interesting and important.

A. L. GOODHART.

LO SCIoglimento DELLE ASSEMBLEE PARLAMENTARI. By GIUSEPPE GUARINO. Pubblicazioni della Facoltà Giuridica dell' Università di Napoli, II. [Napoli. Casa Editrice Dott. Eugenio Jovene. 1948. 293 pp. Price (in Naples) 900 Lire.]

COMMENTO A TOCQUEVILLE. By GINO GORLA. [Milano: Dott. A. Giuffrè, editore, 1948. 345 pp. Price 770 Lire net.]

THE removal of the strait-jacket of Fascism has given the subtle and lively Italian genius both the opportunity and the need to re-explore the fields of political theory and practice. Dr. Guarino examines, clearly and methodically, the occasions and methods of dissolution of Parliament in Britain (where he has the wisdom to see that private correspondence and memoirs often throw more light than do the textbooks on our constitutional working), in Italy before 1922, and in the Weimar Republic; he considers the purposes which a dissolution may serve and its effects on the stability of constitution and government. A final chapter deals with the right of dissolution in the French Constitution of 27th October, 1946. His work should be not only helpful to his fellow-countrymen, but interesting and informative to all students of constitutional law and political institutions.

Dr. Gorla's work is not so much a detailed commentary on Tocqueville as a plea for the relevance of Tocqueville's ideas to our contemporary problems. What he finds congenial in Tocqueville is the relativistic and historical view of the function of law in society and, above all, the *aristocratic* conception of rights, which rests on a sentiment of personal dignity and responsibility. The feudal lord felt his rights to be his just because he was his own strong self. In such ages the prime task of law may well be to assert the claims of society against overweening personalities. But with the growth of central authority the balance swings; the State becomes stronger and men are all reduced to the same level of weakness as single, separate individuals, whose rights are not only construed by legal theory but felt by their holders as concessions from an omnipotent State. Theories of natural rights avail little because they are based on 'abstract individualism' and, not on personality felt as such. Dr. Gorla attaches importance to the psychological question of how men *feel* themselves in relation to the law, and he shrewdly indicates the psychological difference between Continental doctrines of natural rights and the traditional liberties secured by the English Common Law, which are not deduced from any systematic philosophy, but rest strongly on historic memories. At the present moment the need is to find some effective way of ensuring that rights, with their corresponding responsibilities, shall be felt as essential elements of personality and asserted as such against States which are not only omnipotent in legal theory but totalitarian in their practice of government; here, Dr. Gorla claims, a re-reading of Tocqueville may help.

A. H. CAMPBELL.

DR. JOHNSON AND THE LAW. By SIR ARNOLD MCNAIR, K.C. [Cambridge : at the University Press. 1948. xii and 116 pp. 7s. 6d.]

THE modest dimensions and moderate price of this little book must not be allowed to conceal the fact that it is closely packed with riches, and that repeated perusals will result in further discoveries; above all, it has the great merit of sending the reader back to the sources, whence he will embark upon all sorts of explorations on his own account.

There were times when Johnson felt that he ought to have been a lawyer, and recalled his early lack of opportunity with regret, although certainly without rancour. The law was not a closed profession by any means, and men as poor as Johnson not infrequently achieved success at the bar. The chances of his early life had not led him towards the law, however, and so we have the entertaining problem which Sir Arnold (as an *ex post facto* careers-adviser) considers in this little book: was Johnson a great lawyer *manqué*? Would a wise friend have advised young Johnson to go to the bar? If he had entered the profession, would he have attained an eminent position in it?

Johnson certainly had a wide acquaintance among the profession, and Sir Arnold runs through the list of Johnson's circle. Hardwicke and Mansfield he never met, and the latter presided over a set of his own; Blackstone he met but once. Thurlow was a kindred spirit and a match in verbal combat. His friendship with Sir Robert Chambers ended before his interest in law was aroused. Of the other lawyers in the list, the most interesting is Daines Barrington, who received the signal honour of being sought out by the Doctor, after having read his *Observations on the Statutes*. I therefore feel led to suggest that it was legal history which aroused Johnson's keenest interest, and that if Johnson had devoted himself to legal studies he would most probably have joined the brilliant group of historical and comparative jurists—Barrington, Jones, Lord Kames (whom he disliked), and Blackstone—who contrast so remarkably with the stagnant mass of obsolete technicalities which governed a large part of legal practice in that century.

The imperfect catalogue of his books shows that he had a great deal of law on his shelves, and his works show that he had read some of it, to say the least. He advised the king's librarian to collect canonist and civilian books, and especially the works of the feudalists (the legal historian in Johnson speaks again!). Boswell and others sometimes submitted cases to the Doctor. His comments show a broad philosophical approach and his characteristic common-sense. Obviously he never ventured an opinion upon those points of pleading upon which so much, in practice, depended in the eighteenth century. When he thought of himself as a lawyer it seems to have been in terms of Cicero and Grotius rather than of Coke and Mansfield; but it could hardly be otherwise with one who had never embarked upon professional studies. Could he have kept up the pace? Johnson was lazy, and knew it; but like some other lazy men, he was capable of prodigious effort when sufficiently spurred—the *Dictionary* is there to prove it. He might have spent his energy on reading for the bar instead of compiling the *Dictionary*, thus acquiring the technical equipment which he lacked; but even so, can one imagine Johnson writing better *Commentaries* than Blackstone's? His approach would now be called sociological, judging from a number of his remarks, but although society was a fascinating problem for him, it was immediate human contacts which he liked best. Perhaps he answered Sir Arnold's question, quite unconsciously, when he said that 'Lawyers know life practically'. Johnson admired lawyers because they were men of the world, not because they were men of law, and his wish to have been a lawyer was produced by his intense passion for life and intellectual combat with his peers rather than by a temperament that was naturally of a legal cast.

Whatever regrets Johnson may have felt, posterity will be grateful that he did not give to a profession what was meant for mankind.

T. F. T. PLUCKNETT.

FIVE JEWISH LAWYERS OF THE COMMON LAW. By ARTHUR L. GOODHART, K.B.E., K.C., Professor of Jurisprudence in the University of Oxford. [London, Toronto, New York : Geoffrey Cumberlege (Oxford University Press). 1949. 74 pp.]

IN 1938 when the intellectual attack of Nazism on German Jewry was reaching its climax, Professor Sinzheimer, a distinguished German refugee scholar, published a stately volume on the *Jüdische Klassiker der deutschen Rechtswissenschaft*. Professor Goodhart has now presented us with a companion work—characteristically different in manner of presentation, size, and contents from the work of Professor Sinzheimer, but nevertheless inviting comparison. No doubt, Professor Goodhart faced a much more difficult task than his Continental predecessor. Sinzheimer's 'classical jurists' were—as befits the Continental legal tradition—without exception theoreticians of distinction. In his long list of distinguished men, there is not a single practitioner. Professor Goodhart's five common lawyers, on the other hand, are all practitioners, though one of them, Benjamin, has also won fame as a writer and another, Cardozo, has enriched theory by a number of notable contributions to legal methodology. No doubt, it is a much more difficult task to reconstruct the personality of a practitioner out of what is known of his work, than it is to paint a picture of a theoretical jurist, whose publications will reveal much, if not most, of his life and his strivings. Professor Sinzheimer was much under the stress of an exciting and decisive struggle. His work necessarily retained some of the traces of that struggle. It tried to prove that the scurrilous Nazi-thesis that Jews had undermined the spirit of German law, was untrue. However little effort may have been required for this proof, his work here and there acquired an apologetic tinge. No such outside considerations deflected Professor Goodhart from his task of giving a clear, concise and, above all, a living presentation of the achievements of his heroes in the field of the common law, a task which he has solved with that elegance and wealth of significant detail, which distinguishes all his writings. For a first impression of his five lawyers, Benjamin, Jessel, Brandeis, Lord Reading and Cardozo, every student of jurisprudence will turn to this graceful work, which gives ample guidance for further reading and study.

There is, perhaps, one most startling difference between the heroes of Professor Goodhart's book and those of Professor Sinzheimer. Not one of the 'legal classics' of Professor Sinzheimer was actually a member of the Jewish community. All of them were Christians by religion, some of them, like Friedrich Stahl, with the strongest conviction, although Jewish by origin. Some of them were even decidedly hostile to those who still remained within the Jewish fold, above all, again, Friedrich Stahl. It is significant that all the five common lawyers whom Professor Goodhart describes actually remained members of their community, even though the attachment of some of them to the Jewish religion and to the Jewish community was not particularly strong. In fact, Brandeis, who for long was one of the leading figures in American Zionism, is the only one who placed his great gifts not only at the service of the common law, but also at that of the Jewish people. No doubt, the greater freedom of life in this country and the U.S.A. as compared to Germany and Austria, made it possible for the other four to retain a connection which does not seem to have meant a real, spiritual bond for any one of them.

Professor Sinzheimer's book deals with a story which has come to an end. There will be no more Jewish legal classics in Germany. As Rabbi Leo Baeck, the revered leader of German Jewry, has rightly said: 'The history of German Jewry is at an end', even though a few Jews may continue to live—one may hope unmolested—in Germany. But what is the future of the Jewish contribution to common law? Some three years ago

when Professor Goodhart delivered the lecture which forms the basis of this book, that question did not seem problematical. Since then, the State of Israel has come into existence and, though, no doubt, Jews will continue to live in the 'diaspora' and little will, one can confidently expect, be changed in their status in the countries of the common law, one may well be entitled to wonder to which extent the new development will result in diverting the most virile elements from contributing to Western civilisation. Perhaps it is not too fanciful to imagine that—contrary to Arthur Koestler's recent forecast—the new trend may strengthen the influence on the thinking of Jews of the characteristically Judaic ideas. It is not easy to imagine, that a Jew could today—as did Benjamin—become a champion of what have been called 'Egyptian ideology'.

Professor Goodhart in his thoughtful postscript deals with the particularly Jewish traits of his heroes. He sees them in their fundamental liberalism, their clarity of thought, their interest in scholarship, their confidence in the face of adversity. But in considering these traits one must remember that these were men to whom—with the exception of Brandeis—Jewish tradition meant not very much, at best a background, none too clearly remembered, and perhaps never properly seen. What would the outlook of these men have been, if they had been more closely integrated into Jewish life, if they had read the Psalms and the Prophets in their original language, if the treasures of rabbinical lore and learning had been open to them, if they had taken part in the centuries-old struggle of the Jews for their corporate survival? Would it have meant that their contribution to the common law would have been even greater than it has actually been? The present writer may be biased in his conviction that the answer to this last question can only be in the affirmative.

E. J. COHN.

JOINT OBLIGATIONS. By GLANVILLE L. WILLIAMS, LL.D.(Cantab).
[London: Butterworth & Co. (Publishers), Ltd. 1949.
158 pp. Price 21s.]

PROFESSOR Glanville Williams states in his Preface that his objects in writing this most learned and fascinating book were: (1) to fill a gap in legal literature by a full exposition of the law relating to joint and joint and several liability in contract, quasi-contract and trusts, and (2) to draw attention to the seriously defective state of the law in the hope that this may lead to legislative reconsideration.

It is, therefore, both a reasoned exposition (drawing not only on the English authorities but on those of the common-law Dominions) and an indictment, and as both it succeeds admirably. Professor Williams says, 'I do not suppose that any lawyer can read the pages which follow without astonishment that the law can be so involved, inconvenient and unjust', and this is no more than the truth. Obviously the law has only been allowed to remain for so long in this condition because hitherto no one has really grasped how scandalously defective it is. The average lawyer knows that joint obligation is a thing to be avoided and has a fair idea of how to avoid it when drafting a formal contract. But the majority of contracts are not formal, and those in which joint liability arises (*e.g.*, agreements with partnership firms) are of daily occurrence. It may safely be stated that not one lawyer in a thousand fully appreciates the pitfalls that he is liable to encounter when attempting to enforce such obligations. The rest are strongly urged for their own protection (though not for their peace of mind) to read this book with the care which it deserves. If they do, there is little doubt that (having, if they are solicitors, increased their insurance cover against professional negligence) they will be left with a burning determination to see that the law is amended.

Such a body of professional opinion should bring results, for as Professor Williams shows conclusively this is the clearest possible example of the need for that type of 'lawyers' law-reform' formerly undertaken by the Law Revision Committee whose work has unfortunately been allowed to fall into abeyance. Indeed, as he points out, this Committee has already tackled the analogous problem of joint tortfeasors, but, because their terms of reference were too narrow, have merely abolished the rule that judgment against one joint tortfeasor bars rights against the others, leaving unimpaired an exactly similar rule in the case of joint contractors.

Professor Williams is not content merely to expound and criticise the existing rules; he also shows the lines on which they should be amended. In general this would involve the abolition of joint liability and its conversion into joint and several obligations (as has already been done in several States of America). Even this alone would not suffice because, as he shows, the law relating to joint and several contracts is itself imperfect in a number of ways. A complete reconsideration is therefore long overdue.

If, as is to be hoped, such a review is undertaken, it seems unfortunate that Professor Williams has not extended the scope of his work so as to include a consideration of the rules relating to the 'alternative liability' in contract of an agent and an undisclosed principal. No doubt such liability is neither joint nor joint and several but it is analogous to the former, and many of the same rules apply (*e.g.*, that in *Kendall v. Hamilton*). It would be unfortunate if this should be overlooked when any legislative revisions are carried out and Professor Williams' acute analysis of this obscure topic would have been invaluable.

This book is so thorough and well-reasoned that it is difficult for a reviewer to find anything to criticise. The following suggestions are, however, made for the author's and publisher's consideration when a second edition is called for:—

1. The Index is not all it might be and the Table of Cases would be more helpful if it referred to pages rather than Articles (which frequently cover several pages through which the reader may have to search). On the other hand a most useful feature is the preliminary outline of the whole work.

2. The price seems high for a book of only 158 pages. On the other hand these pages contain an immense amount of material, as the footnotes are very copious (despite this the book remains extremely readable thanks to the learned author's pellucid literary style).

3. The practice of referring in the present tense to matters of historical interest only is apt to mislead (*see, e.g.*, pp. 65 *et seq.*).

4. The last sentence of the first paragraph on p. 46 is meaningless as it stands: the obligation of a solicitor cannot be joint.

5. In Chapter 5, the Bankruptcy Rules applying to the joint liability of partners are subjected to a devastating and completely justified attack. But Professor Williams' treatment may give the misleading impression that all difficulties would be solved by allowing the joint creditors double proof against both joint and separate property. This alone would, of course, merely be unfair to the separate creditors. The only method of doing complete justice seems to be first to apportion the partnership assets among the partners in accordance with their rights therein and then to allow joint and separate creditors to prove *pari passu* against the estates of the partners liable to them. Even so, it would still be necessary, as at present, initially to distinguish between partnership and separate property and between partnership and separate debts, and Professor Williams seems unfair when he suggests (at p. 86) that this necessity is caused solely by the existing bankruptcy rules.

6. At pp 97-8 Professor Williams courageously attempts to remove the sting from the *Kendall v. Hamilton* doctrine by suggesting that it may not apply to bar a judgment creditor's rights against a sleeping partner not sued. He concedes that in the case itself the creditor did not know of the

existence of the other partner when he brought his first action, but suggests that that partner was not shown to have been a sleeping partner, and that there had never been any express representation by the other partners that they were the sole contracting parties. His argument proceeds on the basis that the *Kendall v. Hamilton* rule is founded on that requiring joinder of co-promissors, so that exceptions to the latter should also be exceptions to the former. This argument unfortunately seems unconvincing. It is difficult to reconcile it with the opinions expressed in the House of Lords and it is contrary to the interpretation consistently adopted by the profession during the last seventy years. Moreover, as Professor Williams admits, it is very doubtful if the rule is in fact based on that relating to joinder of co-promissors. That it is, in reality, based on merger seems to be conclusively established by the fact that it is equally applied to the alternative liability of an agent and undisclosed principal, for in this case (which in practice is now far more important than that of joint obligations because of Order XLVIIIa) there could not be any joinder.

7. In the example used in § 89 to illustrate the curious position which may arise as regards the right of contribution when one co-debtor is bankrupt, it is difficult to accept Professor Williams' interpretation of the legal position. If, as he expressly states at the foot of p. 169, the £100 for which D1 and D2 are jointly indebted to P was lent to D2 only, then surely D1 is in a position of 'quasi-suretyship' (to adopt Professor Williams' terminology) so that D2 will have no right of contribution? If the £100 had been lent to D1 and D2 jointly then the odd consequences pointed out in the illustration may well occur, but it is suggested that this would not be so on the facts as given and that in this instance Professor Williams has weakened his case by overstating it.

All these are small points however. What cannot be emphasised too strongly is that this is a book which no lawyer—practising or academic—and no legislator can afford to ignore. It is to be hoped that no one will be deterred from reading it because of its unconventional title or from a fear that it is just another work of academic jurisprudence; in fact it deals with an important and well-defined branch of the law, the great practical importance of which is in no way diminished by the accident that hitherto it has never been properly explored.

L. C. B. G.

THE MODERN LAW OF REAL PROPERTY. By Dr. G. C. CHESHIRE, D.C.L., F.B.A. Sixth Edition. [London: Butterworth & Co., Ltd. xlv and 838 and 72 pp. 38s. 6d.]

THE peculiar excellence of Dr. Cheshire's book lies in its intelligibility not only to the swift but to the halt and the lame. Of this aspect of the new edition the present reviewer can speak with some confidence—certainly he is not competent to treat of the minutiae of real property law. A re-reading of the brilliant Introduction, which is little changed, confirms a previous conviction that this is the ideal prelude to the subject. Two suggestions may be made. On p. 26 is quoted Coke's purple passage on Copyholders; at p. 42 appears Blackstone's wail over wardship—both passages are cited uncritically, yet both were far from presenting a true picture. Again, a very brief experience suggests that the lease and release is more easily comprehended if the wording rather than the effect only of the Statute of Uses is given. But it may well be objected that these are over-refinements in an Introduction.

The new edition is forty pages shorter than the last and this notwithstanding the introduction of new material. Town and Country Planning is given three pages, but Rent Restriction only a few lines. There have always been two strong lines of argument against any full treatment of the latter—

the introductory nature of the volume, and the temporary character of the legislation. The second argument is not now convincing, and even so general a book as Hargreaves' *Introduction to Land Law* contains some account of the matter. It may be argued that, at a time when cases on Rent Restriction bulk so large in the current reports, there is some artificiality in a survey of 'The Modern Law of Real Property' that ignores them and discusses at length future interests under the old law. To make room for new matter in this edition there are some omissions and, among them, the discussion of the cases on 'immediate binding trust for sale'. At p. 416 there is instead a reference to Professor Hanbury's *Modern Equity*. Certainly these cases were never a joy to the student, but it seems unfortunate at the present time to accentuate the importance of Equity as a separate study.

On the subject-matter of the new edition, which is brought up to date but little changed, a few comments only can be made. At p. 338 Dr. Cheshire states that the second branch of the rule in *Wild's Case* 'is no longer operative'. This is contrary to the opinion expressed in the previous edition. It is well known that the learned are in dispute on this point; but Dr. Cheshire does not refer to the dispute—and it is arguable that, as the view he now adopts involves a considerable straining of the natural sense of L. P. A., s. 130 (2), some explanation was called for. *Re Cook* [1948] Ch. 212, is cited under the proposition—'if all the joint tenants die except one the trust for sale comes to an end, and the subject-matter vests absolutely in the survivor as realty'. Then on the following page (563), after an explanation of the need for the 1926 amendment to L. P. A., s. 36—'if land is devised in fee simple to a husband and wife jointly, the wife, on the death of her husband, can pass a good title to a purchaser of the legal estate without appointing another trustee in place of her husband'—but naturally, for there is no trust for sale—*Re Cook*. The trouble is that *Re Cook* makes nonsense of the amendment to section 36. At p. 190 there is a statement of the requirements of L. P. A., s. 146, and a note that the statutory notice 'need not require the breach to be remedied if, as in the case of most negative covenants, it is incapable of remedy'. To the cases cited might have been added *Hoffman v. Fineberg* [1948] 1 All E.R. 592, in which Harman J. declined to accept a submission that any breach involving a criminal offence is a breach incapable of remedy, and preferred to look to the stigma involved in the offence.

These are small points. The work as a whole is as clear and readable as ever: in this connection it may be added that the excellent standard of production set by the publishers has been maintained.

G. D. G. HALL.

THE ASSESSING OF SALVAGE AWARDS. By CHARLES T. SUTTON, M.COM., D.SC.(Econ.). [London: Stevens & Sons, Ltd. 1949. xvi and 757 pp. (with index). £6 6s. net.]

I SHOULD like to draw particular attention to this unusual book. It is an attempt by means of a sort of statistical investigation to assess the practical working of the Admiralty Court in salvage cases during the years between the wars. I am not aware that anything of the sort has been attempted before. Although the result is in one sense rather forbidding it contains material of the greatest interest. The working of the law is of fundamental importance in every community, for there is no other way of discovering whether the laws are just and effective. Yet all too little attention has been paid to the scientific study of the subject. The criminal statistics issued by the Home Office throw some light on the working of the criminal law, but one always arises from a perusal of them with the uneasy feeling that the statisticians responsible for them cannot have had any very clear

conception of what they were after. In other branches of the law we are almost invariably thrown back on impressions and opinions as to how the law is working. The committees, for example, which from time to time investigate the working of the Companies Acts such as those under Lord Greene and Cohen L.J. collect the impressions of prominent business men and lawyers and make recommendations on the basis of an assessment of these. The results are, no doubt, generally speaking good—though the accountancy proposals of the Cohen Committee were not very realistic and were not enacted in the 1947 Act—but it is a hit or miss method, and one would like to see a more scientific approach to the problem.

Dr. Sutton has invented a line of attack which he applies ingeniously and successfully to the working of the law of salvage. One would like to know whether it could not be applied—probably it would have to be in a much modified form—to the working of other branches of the law. His approach to his material is that of a statistician, and although he has obviously acquired an extensive working knowledge of the law he lacks the advantage of wide legal scholarship, the addition of which would undoubtedly have considerably increased the value of his book. A good deal of the material is arranged in a somewhat illogical manner, and the book has other defects which are probably inseparable from a pioneering essay of this type. These blemishes, however, detract only slightly from what is undoubtedly a remarkable piece of work.

The body of the book is taken up with a digest and analysis of the cases heard in the Admiralty Court between the Michaelmas term of 1919 and the Hilary term 1939. These digests which average some half page in length set out such salient matters as the salved value of the property, the type of casualty, the salving vessels employed together with their value, the time occupied in the service, the amount of the award, and any special remarks such as the distance travelled by the salvors to the casualty. There follows a synopsis of the judgment and in most cases an attempt to analyse in terms of figures the various factors involved in the assessment of the award. Dr. Sutton has constructed a table of percentage factors which range from 1 per cent. to 12 per cent. of the salved value of the property, *e.g.*, a holed vessel which is not in any imminent danger of sinking pays 2 per cent., while where the sinking is clearly progressing 8 per cent. is awarded: other types of casualty are worked out in a similar way. These percentage factors are applied (i) in accordance with the condition of the vessel; and (ii) in accordance with the extraneous conditions prevailing, *e.g.*, if the sinking vessel is assisted during a hurricane a further 6 per cent. will be added.

To this is added a percentage increase of the main analysis allowances in respect of salved value adjusted on a basis of a standard of £100,000. And finally a salvor's allowance which is allowable initially irrespective of the salved values, and is based on the value of the property used in the salvage operations and calculated at a rate per day during which the salving vessel's services are used. These factors, combined and sometimes adjusted with refinements which space does not allow me to describe, enable Dr. Sutton to reach a figure for what may be called an ideal award. Alternatively, in cases of extraordinary assistance he provides another set of formulæ.

Having surveyed the decisions individually, Dr. Sutton proceeds to their ordering and discussion as analysed, dealing with the different factors involved in separate chapters. Finally, he constructs an elaborate tabular abstract of all the cases dealt with from which the main elements involved may be seen at a glance—truly a labour of much midnight oil. The most interesting and significant result of the analysis is the closeness with which Dr. Sutton's ideal salvage awards approximate to the amounts actually awarded by the courts. It is true that some of the adjustments which he makes

appear to the untrained observer rather to help him to this result, but the general correspondence is too close for this to have been more than a very subsidiary factor. It is rather surprising that the rule of thumb methods employed by the Admiralty judges should be so closely verified, and suggests that with long experience an expertise of a high quality has been attained. Certainly the judges of this court have a great reputation throughout the world for the fairness of their awards, and Dr. Sutton's analysis shows that this is justified.

In the earlier chapters of the book Dr. Sutton explains the main principles of the law of salvage as applied in the courts, and from these deduces the sort of statistical method which should be adopted in order to enable each principal factor to be given its just weight. This part of his work will be of the greatest interest to maritime lawyers, though as Dr. Sutton's style is somewhat involved they may not always find it easy to grasp the point which he is making.

C.

CRIME AND ABNORMALITY. By CECIL BINNEY, M.A., Barrister-at-Law. (Home University Library.) [London : Oxford University Press, Geoffrey Cumberlege. 1949. 176 pp. 5s.]

THIS little work, it should be said from the outset, deals exclusively with the attitude of English criminal law and procedure to offenders suffering or claiming to suffer from mental disease and does not concern itself more than in passing with the wider psychological and sociological problems which the subject raises. Whether, in a book destined for the general reader, this approach can possibly lead to an altogether satisfactory result, may be open to doubt; but there can be none that Mr. Binney has discharged his task, such as it is, with great care and considerable learning and has produced an authoritative survey of the present position.

Inevitably, though other matters such as the law of infanticide and suicide are discussed, the book centres round the M'Naghten rules and the criticism which has long been levelled against their limited scope. Mr. Binney enters the lists of this old controversy between lawyers and medical men with zest on the side of the law, and his wide practical knowledge must give undoubted authority to his exposition and his opinions. This reviewer will, however, perhaps be forgiven if he considers that this fray is no longer what it was and may not always be worth the heavy weapons here employed. Both sides, it would seem, are beginning to realise that a *modus vivendi* can be found. However vast the progress made by psycho-pathological studies in the last 100 years, much medical research is still required before the doctors can claim to be able to assess degrees of mental abnormality with incontestable accuracy. The law, on the other hand, has always disclaimed any intention of encroaching on the medical field. Insanity is not a strict medical term expressing any definite illness of mind, but in the first place a legal conception. The M'Naghten rules, rightly understood, do not provide a test which will establish when a person is suffering from a disease of the mind, but only laid down the conditions in which a court of law will abstain from inflicting criminal punishment on a prisoner on account of a mental disturbance from which he may suffer.

These conditions, it is true, are extremely stringent and would be framed beyond doubt more concisely and probably more generously today, but the mischief they do nowadays is fortunately small compared with the publicity they have attracted. In the first place the M'Naghten rules play for practical purposes a part only in murder trials. For this reason, the whole debate about the scope of the rules would, as Mr. Binney himself points out, become more or less obsolete if the death penalty were to be abolished.

Moreover, it appears that the rules, stringent though their terms, have come to be used with considerable discretion; a high percentage of murder trials end in a verdict of 'guilty but insane', although it is certain that not all of them could have been strictly brought under the existing rules. Finally, it is a fact that even of those condemned to death a large number are reprieved.

Unfortunately the discussion which has for many years centred round the desire to extend the scope of the M'Naghten rules to cover defective control, the so-called irresistible impulse, has diverted to a comparatively minor issue of substantive law the attention which ought long since to have been given to the question whether the present legal procedure in dealing with prisoners suspected of suffering from mental disease is adequate. The common-law principle that in criminal proceedings the prosecution must prove every element of the offence charged does not apply to the question of sanity; insanity is therefore a defence which must not only be proved, but in the first place raised by the prisoner himself. Since the inevitable result of a verdict of 'guilty but insane' is detention at Broadmoor during the King's pleasure (presumably for life), the defence of insanity is in practice never raised except as a last resort in murder trials. In any other trial upon indictment, accordingly, evidence is never offered concerning the prisoner's mental health and the judge, even if he regards the prisoner as insane, can neither put this issue to the jury nor send the prisoner to an asylum instead of committing him to prison. It is said that the prison authorities remove a considerable number of prisoners to an asylum immediately after reception, and this would go to show that they should never have been tried and sentenced at all, but certified before trial. To prevent obvious evidence of insanity from being given effect in court is to make a mockery of certain trials.

More sensible provisions already cover mental defectives under the Mental Deficiency Acts, 1913 and 1927, and have now been introduced for magistrates courts by the Criminal Justice Act, 1948. These statutes demand from the authorities careful investigations and observations of the mental health of criminal offenders and enable the courts to take account of abnormality if established. Mr. Binney does not appear to regard them as evidence of a general trend and considers that any measure to extend similar reforms to all criminal proceedings involving questions of mental disorder would raise more difficulties than it would solve. In this connection he makes much of the famous outcry after the *True Case* to show that interference with the prevailing system 'would not commend itself to popular opinion'. There are signs that the general prejudice against expert evidence and the widespread suspicion regarding the genuineness of defences based on mental disease which have played a part in bringing about this opposition are gradually giving way to a more reasoned, scientific approach. However that may be Mr. Binney is here concerned in the first place with murder trials, while it is, in fact, in proceedings involving lesser crimes that the need for new methods is most strongly felt and here perhaps the obstacles might be less serious.

Even those who do not always agree with Mr. Binney must be grateful to the author for his detailed analysis of the present state of the law and the carefully marshalled arguments for and against reform. There are one or two fanciful remarks in an otherwise sober book which second thoughts might induce the author to modify or cancel. Chapter VI ends in a purple passage of intolerable platitude about the relative happiness of rich and poor, and a similar temptation to generalisation seems to have carried the day on p. 86. These blemishes are pointed out as irritating interruptions in an otherwise stimulating and topical book. For the same reason it must be said that, while the legal terminology of the subject is not of the happiest and Mr. Binney makes on the whole the best of it, expressions such as 'the

procedural attitude towards the criminally insane' should be avoided if only because they tend rightly to bring the law into disrespect with the public.

H. A. HAMMELMANN.

A TEXTBOOK ON INTERNATIONAL LAW. By ALF ROSS, LL.D., PH.D.
With an Introduction by PROFESSOR J. L. BRIERLY. [London :
Longmans, Green & Co. 1947. 318 pp. 21s.]

THIS work by the Professor of International Law in the University of Copenhagen was (not too well) translated into English, because, as the author writes in the Preface, he has 'here attempted an analysis of the fundamental concepts of International Law on the basis of a specifically Scandinavian view of the nature of law and the aims of jurisprudence to which there is probably nothing exactly similar in the Anglo-American literature'.

The book has received a measure of polite welcome from English reviewers, but the present reviewer must frankly confess that he has not found it easy to ascertain the novel and distinguishing features which, in days of paper shortage and binding difficulties, qualified this work for publication in England. Professor Ross who, on the whole, deals with or at least mentions the topics which one would expect to find in any work on general international law, but altogether excludes from discussion the Charter of the United Nations, the law of war and other matters of importance, adopts an approach which throughout is strictly traditional and conventional. Even his 'new definition of the term International Law' as the law 'valid for (binding upon) self-governing communities' is not very striking. The references and the material are not intended to be exhaustive. There is often very little discussion of problems and some points are not even treated as problematical.

Nor is the specifically Scandinavian character of the book readily discernible. In short, though this is a scholarly treatise which is probably very useful for Danish students, English lawyers will derive little benefit from it. In spite of its title it is hardly a textbook within the accepted meaning of the term.

F. A. MANN.

THE CHARTER OF THE UNITED NATIONS. By L. M. GOODRICH and E. HAMBRO. Library of World Affairs, No. 10. [London : Stevens & Sons, Ltd. Second Edition. 1949. xvi and 710 pp. 25s.]

THE first edition of Goodrich and Hambro was published in 1946 almost before the ink of the Charter of the United Nations was dry. Their work is a Commentary on the Charter, article by article, and a collection of relevant documents. It is obvious that at that early date the scope of their work was limited, and it was well nigh impossible for them to make any comments in the light of the practice of the various organs of the United Nations. Nevertheless, one reviewer did not hesitate to say of that edition: 'If a scholar can purchase only one book on the United Nations, this is it'. Such praise is perhaps excessive today, for since 1946 many works have been published which can compete with *The Charter of the United Nations*, while at that time the two learned authors had practically a complete monopoly. It cannot be denied, however, that from the point of view of the English-speaking world Goodrich and Hambro still stands head and shoulders above any rival.

Those critics who found the first edition too formalistic cannot make the same complaint against this new edition, for not only is the Charter interpreted literally in accordance with the text of its articles, but this skeleton

is filled with flesh and the whole interpreted in the light of practice. Thus, for example, we find Article 22 of the Charter, which authorises the General Assembly to establish subsidiary organs, construed in the light of the foundation of the 'Little Assembly'; while the various suggestions for reforming the voting procedure of the Security Council are explained, and it is pointed out that 'the practice of abstention has assumed chief importance as a device by which some flexibility has been introduced into the rather rigid voting procedure' of Article 27 (3) of the Charter. In addition, the various issues that had been brought before the General Assembly and the Security Council by the middle of 1948 are all fully discussed and their significance for the development of the Charter estimated.

Among the new documents included in this work are the agreement between the United Nations and the Food and Agriculture Organisation as an example of a typical agreement made with a specialised agency, an instance of a trusteeship agreement—that for Tanganyika, and the Convention on Privileges and Immunities of the United Nations. In addition, there is a useful bibliography of both official and unofficial publications.

English readers often found it difficult, in view of financial and import restrictions, to obtain copies of the first edition. This difficulty would have been even more serious with regard to the present edition, particularly since the devaluation of the pound. The London Institute of World Affairs, and their publishers, are not only to be congratulated on obtaining the English rights of this work, but they are to be thanked for making it possible for students of the United Nations resident in this country to obtain Goodrich and Hambro's *Charter of the United Nations* in its new and larger form.

L. C. GREEN.

THE HADAMAR TRIAL. Edited by EARL W. KINTNER. War Crimes Trials Series. Vol. 4. [London: Hodge. 1949. xxxviii and 250 pp. 18s.]

THE chief interest of *The Hadamar Trial* lies in the fact that it is the first case coming before an American war crimes tribunal to be published in this series.

The facts of the case were simple and straightforward. The Hadamar Institution was a mental home, and in 1941 the extermination of German mental defectives by means of lethal injections began. From January to August, 1941, at least 10,000 Germans were 'mercifully' put to death in this way at Hadamar. These deaths formed no part of the accusation against the accused. They were cited by the defence to show that such exterminations were part of the normal routine at the institution. In 1944, however, this policy was extended to slave labourers from the occupied territories, and between June, 1944, and March, 1945, 476 Polish and Russian men, women and children were murdered at Hadamar. Ostensibly they were suffering from incurable tuberculosis, but there was no X-ray apparatus nor any medicaments for the treatment of this disease at Hadamar. Furthermore, autopsies showed that at least some of the bodies exhibited no sign of the disease, while the accused themselves agreed that no medical examination was carried out at Hadamar. The victims were received and buried in a matter of hours.

The tribunal was a Military Commission appointed by the Commanding General, United States Army, Western Military District of Germany, and at least one of its members was legally qualified. This fact is important, because, unlike the British military tribunals hearing similar cases, before an American Commission the Judge Advocate is not the legal adviser of the court, but is himself the military prosecutor. Because of this it is impossible to ascertain the grounds upon which the decision of the court is based, for in the absence of the Judge Advocate—in the English sense—there is no summing-up, and

one can only assume that the exposition of the law by the prosecution or the defence was correct, depending on the verdict.

One or two points of a non-legal character arise from this case. It soon becomes evident from the statements made by the accused that no pressure was applied upon them to keep them at Hadamar, and they were never directly threatened with the concentration camp or any other form of punishment should they talk of their knowledge or their experiences. Today, one often hears it said that the German masses knew nothing of what went on in the concentration camps or other torture establishments. In connection with Hadamar, at least, no such contention is possible. The accused constantly repeated that the local residents knew of the purpose of Hadamar, and they went so far as to say that 'during the year 1941 because of complaints from Germans this work (of exterminating German mental defectives) was eliminated'.

The chief problem of law involved was raised by the defence, who contended that the executions were legal—Poland had become part of Germany; while the Soviet Union had not accepted the Geneva Convention—and were covered by the German extermination decree. The only point that merits examination is the exact nature of the extermination decree. The ex-Chief Prosecutor of Wiesbaden was called on behalf of the defence. He spoke at length about a secret and unpublished order providing for the extermination of the mentally diseased, and testified that no prosecution could be brought on behalf of the relatives of a deceased lunatic. Under cross-examination, however, he agreed that the order related solely to German incurable insane and had no reference to foreigners, and he expressed great surprise when he learned that foreigners who were not insane had been exterminated at Hadamar.

In his foreword, Justice Jackson says that the record 'exhibits the depths to which the Nazi regime descended'. It does far more, it exhibits the depths to which human beings descended under that regime. The chief female nurse was an ardent Catholic, and evidence was given on her behalf to show that she was greatly upset by the extermination of the German insane and did all she could to ease their last hours. She never, however, made any determined effort to leave Hadamar, and when asked how her Christian conscience reacted to the murder of the Russians and the Poles, she replied: 'I did not burden my conscience'. Another of the accused, who confessed that he had been personally responsible for administering at least half of the injections, contended that he should never have been tried as he was 'only a little man'. He further maintained: 'I never did anything wrong. You can ask all my patients'. He did not suggest, however, how one questioned the dead.

Upon a secret written ballot by two-thirds of the members of the court present, three of the accused were sentenced to death, and the remainder to varying terms of imprisonment.

This series of reports will serve a useful purpose if people will bear in mind Justice Jackson's comment: 'They record the concepts of law and standards of decency which the prosecuting nations have invoked to condemn the Germans and to which the victor nations have thereby become committed. . . . On the record by which we have judged our enemies we too will be judged, and we do not shrink from the test'.

LESLIE C. GREEN.

THE LAW AND CUSTOM OF THE SEA. By H. A. SMITH. [Stevens & Sons, Ltd. (The Library of World Affairs). 1948. x and 193 pp. 12s. 6d.]

PROFESSOR H. A. Smith for many years combined the functions of Professor of International Law at the University of London and of Lecturer

at the Royal Naval War College and has become an outstanding expert on the subject to which he devotes his book. He makes it clear that the main purpose of this book is not to give an historical exposé, but to discuss present-day problems. Nevertheless he gives a fair amount of introductory historical data, which is of great interest to the reader. Part One of the book is concerned with the present state of the laws of peace at sea, particularly in internal waters, in territorial waters and on the high seas. In the last chapter several problems are discussed in detail, *e.g.*, piracy, self-defence, hot pursuit, the slave trade, fishery control, traffic at sea, etc. Two sets of problems may be of special interest to the modern reader of International Law, *i.e.*, problems connected with the sea bed and with the air space over the sea. Apart from the old controversy *mare liberum* versus *mare clausum*, which was settled by Grotius in favour of the freedom of the High Seas, there remains the problem of areas on or under the high seas which might be physically capable of effective occupation and possession, *e.g.*, a small portion of the sea bed. An anticipation of future events may be found in the project and draft convention negotiated in 1876 between this country and France for the construction of a Channel tunnel. It was assumed on both sides that, should this convention come into force, the law would permit an occupation of the subsoil of the open sea. The establishment of floating airfields would be a similar kind of problem. If not connected permanently with the sea bed, they would be regarded as ships. If however they were permanently attached to the sea bed, they might in the view of the author be assimilated to artificial islands and might even have their own territorial waters. The air space above the sea is of course free for navigation by the aircraft of all countries on equal terms. In times of war, air operations at sea should be governed by the law of the sea.

By far the greater part of the book is devoted to the laws of war at sea. The experience of two world wars is here discussed and the contributions of Germany to an unfortunate development of habits at sea reconsidered. One of the most interesting problems in this part of the book is economic warfare. To prevent supplies of any kind from being carried by sea to the harbours of the enemy, the Allied Powers applied the law of blockade, of contraband and the right to seize enemy property found at sea. Methods applied by the enemy excelled in ruthlessness and called gradually for counter-measures. The law of contraband with its Grotian distinction of absolute and conditional contraband became obsolete, as the fight was directed against the whole economy of the enemy. Methods of applying blockades and of breaking them differ entirely from the past. Professor Smith comes to the conclusion that 'the value of economic warfare in future wars seems to depend upon the effectiveness or non-effectiveness of the law. If the law is observed, economic pressure by sea is not likely in most cases to be a serious contribution to the final decision. The observance of the law by the belligerents will depend chiefly upon the power of the neutrals to enforce it and we may expect that in all wars of limited scope neutral strength will be amply sufficient for the purpose'.

Unfortunately we can hardly expect future wars to be of limited scope and the growing economic interdependence of the world in time of peace as well as of war will make economic warfare fiercer than ever. The mission of neutrals to establish sufficient jurisdiction for the observance of the law might remain an illusion for the international lawyer of the twentieth century. It seems that pessimism finally prevails over optimism, when the author says that 'in effect the belligerents decide for themselves by what rules they will be bound'. However, he believes that sanctions applied to the more ruthless enemy, to compel him to observe the laws of war, should always be discontinued after their purpose has been achieved.

CHARLES H. ALEXANDROWICZ.

TRAITÉ DE DROIT INTERNATIONAL PRIVÉ COMMERCIAL. By P. ARMINJON. [Paris, Librairie Dalloz. 1948. 620 pp. Price : 900frs.]

IN this country it has never been usual to recognise the separate existence of a 'Conflict of Commercial Laws'. Even on the Continent where commercial law is in many respects a much more distinct branch of the law, private international law relating to it has of late tended to be included in the general treatises, though there exist a few works (by Diena, Cavaglieri, Schnitzer and Travers) exclusively devoted to the conflict of commercial laws. Professor Arminjon's recent book represents an effort to revive a tradition which seemed to become unfashionable.

This is a voluminous work. In its six main chapters it treats a great many matters at great length, but it contains nothing on a field which an English lawyer would expect to be given pride of place. The first chapter is devoted to fundamental conceptions such as 'actes de commerce' and 'commerçants'. The second sets forth the law relating to commercial associations. The third contains on 120 pages a discussion of the law of contracts which could form part of any general work on conflicts. In the fourth chapter negotiable instruments are dealt with. In the fifth, specifically commercial contracts, such as contracts with banks, brokerage, transport on land and by air, and assurance, are analysed. The sixth and last chapter describes the international effects of bankruptcy. Transport by sea and, indeed, maritime law are nowhere mentioned.

The author frequently refers to English law, but it is doubtful whether he has fully appreciated the effects of English practice and theory. Thus, on the problem of the proper law of contracts, the author has allowed himself to be greatly influenced by Dr. Cheshire, but such decisions as *Vita Food Products v. Unus Shipping Co.* [1939] A.C. 277, do not seem to have been considered by him. Even as regards French practice and doctrine it has, apparently, not been the author's ambition to state it accurately and comprehensively. The attraction and merit of the work lies in the fact that it propounds the views of an author whose reputation, experience and learning are such as to command respect and attention whenever the state of French thought on private international law requires to be ascertained.

F. A. MANN.

EUROPEAN LEGISLATION ON DECLARATIONS OF DEATH. Compiled by the Office of General Counsel, European Headquarters, American Joint Distribution Committee. [Paris : American Joint Distribution Committee, 119 Rue Saint Dominique. 1949. 199 pp.]

DURING the second world war something like fourteen million people have been put to death in Europe. Nearly six millions of these were Jews. The majority of these were killed in German annihilation camps under circumstances which render it impossible to ascertain the date of their deaths. No wonder that the American Joint Distribution Committee, the greatest Jewish welfare organisation in the world, has found it advisable to compile for the benefit of the survivors of the unfortunate victims and their legal advisers this survey of European legislation on presumption of death. They have done their work very well indeed. The translations of the various national rules are accurate. The selection of texts is up to date to January, 1949. English law is well represented by a reprint of Dr. Breslauer's informative article from the April issue 1947 of this Review and of Mr. Justice Willmer's decision in *In the Goods of Schulhof and Wolf* and of the older case, *In the Goods of Spenceley* [1892]

P. 255. One of the Appendices deals with the recognition of foreign declarations of death in the State of Israel. Another contains a draft convention on the topic proposed by the Economic and Social Council of UNO. In an introduction to the volume Dr. G. Weis, to whose initiative the work is due, shows the necessity of an international convention on this subject-matter. There can be no doubt that this publication will be welcome and useful to all those whose sad lot it is to deal professionally with the effects of the greatest mass murder in the history of humanity.

E. J. COHN.

GREEK LAW. Three Lectures delivered at Cambridge and Oxford in 1946. By PAN. J. ZEPOS, LL.D.(Athens), Professor of Civil Law at the University of Thessalonike. [Athens : Printed by A. Sideris, 23 Veranzerou St., Athens. 1949. 119 pp.]

THIS reprint of Professor Zepos' three lectures, the third of which has already been published in the *Journal of Comparative Legislation* (Vol. 28, 1946), places into the hands of comparative lawyers a welcome introduction to the history of Greek law and to modern Greek legal science in which the learned author himself plays, as is well known, a very considerable part. In the first lecture the author stresses the continuity of Greek legal tradition, which he claims—with a little exaggeration, it would seem—to have lasted 3,000 years. No doubt, he is right in pointing out that without the work of the Byzantine lawyers Roman law would not have reached us in that form and with that flexibility which rendered its adoption by the greater part of the modern world possible. Modern Greek law has received many suggestions from French and German law, but, as the author rightly says, these laws have themselves continued the Roman-Byzantine tradition and were thus able to influence Greek law without undermining the native legal tradition. The work deserves attention not only as a convenient introduction to the legal thought of modern Greece, but also as a stimulating assessment of the relationship between contemporary legal thought in the civilian legal systems and the Roman law system from which they have taken their origin.

E. J. COHN.

AUTOBIOGRAPHY. By SIR PATRICK HASTINGS, K.C. [London : William Heinemann, Ltd. 1948. 302 pp. 15s.]

CASES IN COURT. By the same author and publisher. [1949. 342 pp. 15s.]

'As places of entertainment', says Sir Patrick, 'I have never quite understood why the Royal Courts of Justice are not more generally patronised; people who are content to pay twelve shillings and sixpence to see unreal drama portrayed upon the stage would never dream of crossing the Strand where, without any payment, they can see a picture of real life presented to them every day'. The reason is, perhaps, that we are not all brave spirits. Our consciences may be caught in the play but the terror with which we glimpse ourselves can be dispelled with the remembrance that 'it didn't really happen'; we can sleep thankful that we only dreamt we were so rudely awakened, and can quickly persuade ourselves that the reflection we saw was of someone else, standing at our shoulder. But truth is stronger than fiction and not so easily forgotten. No one who reads this autobiography will doubt that Sir Patrick is in the manlier minority which scorns these subterfuges. The first part of this book is appreciably better than anything else in the two volumes. Accounts of the early struggles of a man whom we know to have been

successful can be very tedious. But here the writing is so buoyant and the enjoyment of adventure so vividly recalled that we feel we know the young man of whom we were wholly ignorant far better than the older man whose exploits filled the newspapers. 'Chance', says Sir Patrick, 'is only another word for opportunity'. Yet he is full of gratitude to those who gave him his opportunities. Perhaps he was lucky in this sense: that he received the greatest help at the time when he needed it most. But the courage to seize the opportunity and to use it to the full was all his own. To support this, we should have to fill the rest of the review with quotations. It is better to read the book.

'Astings', said the sergeant-major, 'You ought to be a bloody lawyer'. In one sense, as the author says, he was not. He was an advocate. The second volume contains twenty-one cases. They include the Youssouppoff, Sievier and Laski libel actions, the Courtauld arbitration case and the murder trials of Rouse, of Mrs. Barney and, most moving of all, of 'John Williams', the Hooded Man. All are, of course, extremely well told, but it is advisable not to read this book too soon after reading the *Autobiography*. Four of the Cases in Court are recounted in the earlier volume and there are one or two inconsistencies. In each volume the author writes of the time when a young barrister suddenly finds he has passed through his early struggles and is beginning to be successful. The words he uses are similar but not identical, and he indicates two different occasions for his own crossing of the Rubicon.

'On est comme on est'. Sir Patrick is fond of the phrase and is reluctant to plunge deeper. He was, he admits, an unsatisfactory navy and engineer, an inefficient soldier, a bad journalist, an inferior playwright, an ineffective politician and a failure as a poet. He has given the world his poem on the last page of his *Autobiography*. He describes it, with masterly understatement, as a 'revolting effusion'. He is as he is. So are we all, but with this difference. We cannot all write of what we are.

J. A. G. GRIFFITH.

A GUIDE TO PRACTICAL CONVEYANCING. By EDWARD MOERAN.
[London: Sir Isaac Pitman & Sons, Ltd. 1949. 76 pp.
7s. 6d.]

THE title of this book is no misnomer since the book is chiefly concerned with the 'mechanics' of conveyancing, as such it will be welcome by those to whom order does not come easily and for whom a completion tends to become the occasion of last-minute alarms and rushed searches. To the new articulated clerk it will be even more welcome for its explanation of such mysteries as the completion statement, and for its demonstration that an inspection of deeds involves more than a pleasant visit to the other side, a fact that is not always clear where titles are well known. Apart from setting out a useful routine the book contains much sound if neglected advice on other matters. The number of inappropriate or duplicated inquiries, encouraged by the use of printed forms, which are made in excessive, and dangerous in that they encourage formal and meaningless answers to the whole.

In the result the author has produced a book of real utility and there can be no doubt that if attention is paid to some such routine as the author suggests, the mind is set free for the pure law and art of conveyancing. Fortunately, although the book is in a sense a sermon, the 'preacher' has an easy style and his pleasant denials of perfection either in his office or his system make his precepts the more acceptable. The author has done his best to be helpful and if some still prefer or cannot avoid the alarms and excursions the fault is not his.

J. D. B. MITCHELL.

COMPULSORY PURCHASE OF LAND. By A. J. W. JEFFERY, D.P.H., A.C.I.S. [Leigh-on-Sea : The Thames Bank Publishing Co., Ltd. 1949. 41 pp. and Appendices 99.]

THE scope of this book is limited as the author makes clear when he claims it as a practical manual for the preparation of compulsory purchase orders. This fact does not diminish its value since the claim is fulfilled without confusing the matter with, for example, the ramifications of the 'natural justice' cases. The first forty pages are thus taken up with a clear stage by stage description of the procedure and practice, based primarily on the 1946 Act. The purpose of each stage is thus left apparent, and the text is supported by sufficient references to allow an inquirer to pursue particular matters. The Appendices consist of reprints of statutes and of forms and precedents. If the book could not make exciting reading, it does at least make lucid reading, and is of considerable use. Indeed, its utility is not restricted to those in local government offices, or who are advising clients, even for students there is always room for an explanation of how the apple does get into the dumpling.

J. D. B. MITCHELL.

RANKING AND SPICER'S COMPANY LAW. Eighth edition by H. A. R. J. WILSON, F.C.A., F.S.A.A., and T. W. SOUTH, B.A., Barrister-at-Law. [London : Sir Isaac Pitman & Sons, Ltd. 1949. xxxii and 496 pp. (with index). 21s. net.]

THIS is a well-known text book on company law which is intended particularly for accountants and company secretaries and for students studying for those occupations. For this class of reader it is one of the best books with which we are acquainted. It should be noted that since there is a companion volume on company winding up that subject is not dealt with in this work.

Its great value lies in its clarity and accuracy. The material is attractively set out in good-sized type and well spaced on large pages so that reading is physically a pleasure. On the other hand cases are referred to as authorities simply and without their facts (in most cases) while it is only rarely that quotations are given from the judgments, and this undoubtedly makes study somewhat heavy going.

The passing of the Companies Acts, 1947 and 1948, has of course called for a complete revision of the old text and a great deal of rewriting. This has been done thoroughly and competently, and all the excellent qualities of the original work have been well maintained.

C.

COMPANIES AND COMPANY LAW. By A. C. CONNELL, LL.B. Sixth Edition by A. T. PURSE, LL.B., Barrister-at-Law. [London : Sir Isaac Pitman & Sons, Ltd. 1949. xiii and 537 pp. Price 15s. net.]

THIS is an extremely useful book and remarkable value. It contains 218 pages of text in which the law is lucidly summarised, followed by reprints of the Companies Act, 1948, and the Prevention of Fraud (Investment) Act, 1939. The work of revision has been well done and the book can be heartily recommended to students and others requiring a short guide to the modern company law.

NATIONAL INSURANCE. By JOHN GAZDAR, LL.B., Barrister-at-Law.
'This is the Law' Series. Second Edition. [London: Stevens
& Sons, Ltd. 1949. 96 pp. 4s.]

THIS book sets out in a simplified form the effect of the National Insurance Act, 1946, and the regulations made thereunder. The Industrial Injuries Act is outside its scope, save that the contributions payable under that Act are specified. The author hopes that this new edition will prove of value not only to the man-in-the-street but also to those who are concerned in the administration of the Act. It is, perhaps, for this reason that the author has chosen to support his account of the Act with references to sections and the regulations. The exposition is clear and well written; the material has obviously been thoroughly mastered. But we suggest that it was probably a mistake to try to reach beyond the man-in-the-street. If the references to the Act and the regulations have to be followed up by the reader, he will be forced back to the weightier tomes on this subject. For those who require a simple explanation, the references are superfluous and hamper the reading. But the value of simple exposition of the law cannot yet be assessed. It would be interesting to know if this second edition sells better than the first.

J. A. G. GRIFFITH.

SOCIAL LEGISLATION AND WORK IN FINLAND. Published by the
Ministry for Social Affairs. [Helsinki: 1949. 179 pp.]

THIS short survey of social policy in Finland contains a considerable amount of material of interest to the student of comparative labour law. This is especially true of the chapter on 'Labour Relations' which deals, inter alia, with the legal regulation and effect of collective agreements with the Labour court, with the settlement of labour disputes and with the statutory system of compulsory 'Factory Committees'. Other matters of special legal interest are the survey of hours of work legislation in a chapter entitled 'Worker's Protection', the analysis of the Workers' Annual Holiday Act of 1946, and the—all to brief—discussion of social insurance legislation. It is interesting that Temperance and Liquor Trade Legislation belongs to the province of the Ministry of Social Affairs.

O.K.-F.

Other publications received:—

THE DEATH DUTIES. By ROBERT DYMOND. Third (Consolidated)
Supplement to the Tenth Edition, to December 31, 1949. [The
Solicitors' Law Stationery Society, Ltd. 10s. 6d.]

CHANGE OF NAME. By J. F. JOSLING. Third Edition, 1950.
Oyez Practice Notes. [The Solicitors' Law Stationery Society,
Ltd. 2s. 6d. net.]

THE EFFECTS OF TAXATION ON FOREIGN TRADE AND INVESTMENT.
[United Nations Publ. No. 1950. XVI 1. 3s. 9d. stg.]

**LES PRINCIPES DE LA BILATÉRALITÉ ET DE LA POSSIBILITÉ D'INTER-
NATIONALISATION DES RÈGLES DU DROIT INTERNATIONAL PRIVÉ.**
By P. G. VALLINDAS. [Athènes. 1948.]

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- CURRENT LAW YEAR BOOK, 1949. General Editor : JOHN BURKE, Barrister-at-Law. [Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. £2 2s.]
- THE LAW OF RENT RESTRICTION IN IRELAND. By JOHN R. COGHLAN, B.A. (Moderator in Legal and Political Science), LL.B., T.C.D., Barrister-at-Law. Second Edition. With a Foreward by the HON. MR. JUSTICE WILLIAM BLACK. [Dollard Printing-house, Dublin, Ltd., Wellington Quay, Dublin. 1950. xxxiv and 250 pp. 27s. net.]
- COSTUMBRES Y USOS CONSTITUCIONALES. By JORGE RANE POVIÑA. [Instituto de Derecho Publico. Universidad Nacional de Tucuman. 1950. 144 pp.]
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- UNITED NATIONS DOCUMENTS INDEX. [United Nations and Specialised Agencies Documents and Publications. January, 1950. Vol. 1. No. 1. Annual subscription 50s.]
- REFORM OF INCOME TAX AND SOCIAL SECURITY PAYMENTS. A Liberal Party Yellow Book. [March, 1950. 40 pp. Price 1s.]
- THE INDIAN DIGEST, 1949. By V. V. CHITALEY, B.A., LL.B. and S. APPU RAO, B.A., B.L. [The All India Reporter, Ltd., Nagpur.]
- ADOPTION OF CHILDREN. By J. F. JOSLING. Second Edition, 1950. Oyez Practice Notes, No. 3. [The Solicitors' Law Stationery Society, Ltd. 7s. 6d. net.]
- FEDERAL INCOME ESTATE AND GIFT TAX LAWS CORRELATED. Tenth Edition. By WALTER E. BARTON. [Tax Law Publishing Co., Washington 5, D.C. 1950. \$35.]
- TRANSFER OF PROPERTY ACT. Vol. I. [All India Reporter, Ltd., Nagpur.]
- LIFELINE. The Eleventh. Spring 1950. ['Lifeline', Gray's Inn Chambers, High Holborn, W.C.1.]
- INTERNATIONAL MONETARY FUND. Schedule of Par Values. Tenth Issue. [Washington, D.C. 1950.]